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Republic of Kenya

**Report of the Task Force
on the
Establishment of a Truth,
Justice and Reconciliation
Commission**

Chairperson

Prof. Makau Mutua

Presented to

Hon. Kiraitu Murungi

The Minister for Justice and Constitutional Affairs

August 26, 2003

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**Report of the Task Force
on the Establishment of a
Truth, Justice and Reconciliation Commission**

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ACKNOWLEDGEMENTS

The Task Force on the Establishment of a Truth, Justice, and Reconciliation Commission will be a significant body in the history of Kenya. Never before, in the forty year history of our country, has the government sought to genuinely establish the views of Kenyans with a view to confronting past human rights abuses and atrocities. The Task Force is a testament to the commitment of President Mwai Kibaki and the Government of the National Rainbow Coalition to reconstruct Kenya into a democratic, rule of law state. But the Task Force would not have been possible without the dedication and devotion of the Honorable Kiraitu Murungi, the Minister for Justice and Constitutional Affairs, to human rights, the rule of law, and a state free of impunity. Since Mr. Murungi appointed the Task Force on April 17, 2003, he has without equivocation fully supported its work. The Task Force owes its success to the unwavering support and guidance that Mr. Murungi has so generously given it.

The Ministry for Justice and Constitutional Affairs, the home of the Task Force, has been invaluable in the work of the Task Force. Its logistical, secretarial, and material support have been the foundation on which the Task Force has stood. The facilitation of the work of the Task Force by the Honorable Robinson Githae, the Assistant Minister for Justice and Constitutional Affairs, and Mr. Jeremiah Matagaro, the Permanent Secretary in the Ministry, have been critical to the endeavors of the Task Force. Although new, the Ministry for Justice and Constitutional Affairs has worked under difficult challenges to meet the demands of the Task Force, even as it balanced other competing interests for resources and personnel.

Two private, non-governmental institutions have been critical to the overall work and success of the Task Force. The First is the Ford Foundation regional office in Nairobi that at the inception of the Task Force generously supported it with a grant of \$160,000. It is not possible to overestimate the enormous impact this grant had on the work of the Task Force. The grant became the major source of financial support for the work of the Task Force. Many of the activities of the Task Force, such as the provincial visits, the national and international conferences, research, and general office support would not have been possible without the grant. I wish to take this opportunity, on behalf of the Task Force, to sincerely thank Dr. Tade Aina, the Regional Representative, and Mr. Joseph Gitari, the Program Officer, respectively, of the Ford Foundation offices in Nairobi for their generous support.

The second organization that has been invaluable to the Task Force is the Kenya Human Rights Commission, the leading human rights group in the country. The KHRC received the Ford Foundation grant, and has professionally managed it for the Task Force and the Ministry of Justice and Constitutional Affairs. The KHRC also seconded to the Task Force Ms. Jennifer Wanjiku Miano, a lawyer and its Senior Program Officer, as a lead researcher and the Ford Foundation grant administrator. Ms. Miano has performed superbly. The KHRC also seconded to the Task Force Mr. James Waititu of its Litigation Fund as a press aide. Mr. Waititu has managed the publicity campaigns and press relations of the Task Force extremely well. Ms. Beatrice Kuria, the KHRC's Finance Manager, and Ms. Noelina Nabwire, its Program Officer, have rendered much needed service to the Task Force. Mr. Curtis Murungi, an intern at the KHRC from Harvard Law

School wrote a paper on the views of Kenyans on a truth commission for the Task Force. But the foresight and commitment of the KHRC to the Task Force and the transitional justice agenda lie with its Executive Director, the incomparable Dr. Willy Mutunga, whose dedication to human rights is legend in Kenya.

Several other organizations and individuals have selflessly given of themselves to the work of the Task Force. Mr. Davinder Lamba, the Executive Director of the Mazingira Institute, has been key to the work and success of the Task Force. He has conceptualized, organized, and executed countless tasks for the Task Force, including labourious and sensitive work of editing and desktop publishing. He and Mazingira Institute have generously availed to the Task Force their resources and support. Henry Macharia has assisted him in this task. Special mention must be made of the Theatre Company and Transparency International who worked tirelessly to stage *Death and the Maiden*, the internationally acclaimed play by Ariel Dorfman. The Task Force is grateful to Ms. Mumbi Kaigwa, Mr. Eddie Mbugua, and Mr. Raymond Ofula for a great performance. Mr. Keith Pierson, the director, did an excellent job. Mr. David Makali, the Executive Director of the Kenya Media Institute, assisted with the technical editing of the annexures of report.

The Task Force has been lucky to enjoy the professional and excellent service of a number of individuals. These include Ms. Wanza Kioko, a lawyer with the human rights organization CLARION. Ms. Kioko, a young scholar of transitional justice, was a lead researcher for the Task Force. But she also organized and carried out many duties for the Task Force. Her work has been invaluable. Mr. Mugambi Kiai, a Task Force consultant, is a prominent human rights advocate in Kenya who wrote a comprehensive paper for the Task Force. Mr. Ronoh Tuimising, a tremendously keen and professional lawyer with the Ministry of Justice and Constitutional Affairs, was also a lead researcher with the Task Force.

I would also like to acknowledge the great work and assistance that the Task Force received from various provincial, district, and local administrators, police, and security personnel throughout the country. These administrators and public officials helped publicize the work of the Task Force ahead of the provincial and district visits and generously hosted members of the Task Force. I would like to specially recognize Mr. Ernest Munyi, the district commissioner of Wajir District who went beyond the call of duty in his hospitality to the Task Force.

The media is an invaluable partner in a national undertaking as grave as the quest for a truth commission. I want to salute all the media houses that kept Kenyans informed of the work of the Task Force. I want to single out the Nation Media Group, and in particular Ms. Njeri Rugene of the Daily Nation, for her objective and balanced reporting on the work of the Task Force. The Kenya Broadcasting Corporation and Mr. Njonjo Kihuria of the East African Standard also kept Kenyans informed of our work. Other media outlets that have reported on the Task Force include The People, KTN, Nation TV, Nation FM, Kiss FM, Capital FM, Citizen Radio and TV, Kameme FM

Many officials of the Ministry of Justice and Constitutional Affairs generously supported the Task Force. These include Mr. Patrick Okoth, Mr. Seno Nyakenyanya, Mr. Johnson Weru, Mr. David Gathii, Mr. Wilfred Tanui, Mr. Edwin Kithinji, Ms. Beatrice Muthoni, Ms. Magdalene Oundo, Mr. Mutambuki Mbuvi, and Ms. Anne Ogolla-Mwita, who was a critical link in the secretariat of the Task Force. I want to acknowledge their service.

Last, but not least, I want to express my heartfelt appreciation to the members of the Task Force for their dedication, hard work, humility, patience, and guidance in this national undertaking. They are Rev. (Dr.) Timothy Njoya, the Vice Chair of the Task Force, Rev Mutava Musyimi, Mr. John Githongo, Mr. Davinder Lamba, Ms. Jane Kiragu, Ms. Raychelle Omamo, Ms. Mumina Konso, Ms. Zarina Patel, Dr. Josephine Ojiambo, Sheikh Ali Shee, Bishop (Prof.) Zablon Nthamburi, Rev. Patrick Rukenya, Dr. Amukowa Anangwe, Mr. Julius Sunkuli, Mr. Kibe Mungai, Mr. Tirop Kitur, Mr. Kairichi Marimba, and Ms. Roselyne Lagat-Korir, the Secretary to the Task Force who coordinated and oversaw the secretariat. I am indebted to them all.

Professor Makau Mutua

Chairperson

The Task Force on the Establishment of a Truth, Justice and Reconciliation Commission.

Nairobi, August 26, 2003.

INTRODUCTION

In December 2002, Kenyans decisively rejected despotism and kleptocracy. In one of the most peaceful regime changes in Africa, Kenyans voted out the Kenya African National Union, the party that has ruled the country since independence from the British in 1963. Although at first tolerant, the Kenyatta regime became increasingly corrupt and authoritarian. By the time he passed away in 1978, President Kenyatta had crafted a state symbolized by personal rule, a culture of nepotism, public theft, and gross violations of human rights. Incredibly, President Daniel arap Moi, heightened repression and perfected the corrupted state left behind by President Kenyatta. The Moi-KANU regime was marked by shameless graft, abominable human rights violations, impunity, and national decay. This is the legacy that Kenyans hope President Mwai Kibaki and the ruling National Rainbow Coalition will transform.

There is no doubt that in December 2002 Kenya witnessed regime change. This was the first fundamental change in the ideology, rationale, and philosophy of the Kenyan state since 1963. The Kenyan state is for the first time in its history formally committed to transitional justice, the rule of law, and democracy. The appointment in April 2003 by the Minister of Justice and Constitutional Affairs of the Task Force on the Establishment of a Truth, Justice, and Reconciliation Commission is a milestone in the country's quest for a transitional justice agenda. It represents the transformation of the soul of the Kenyan state and is a significant first step in the long and arduous journey to reclaim the moral and political fiber of the country. In this respect, it must be noted that transitional justice is a broad program, and the truth commission is just one component of that complex phenomenon.

The people of Kenya have spoken, and the Task Force is privileged to report that Kenyans want a truth, justice, and reconciliation commission established immediately. The overwhelming majority of Kenyans, over 90 per cent of those who submitted their views to the Task Force, want the government to establish an effective truth commission, a vehicle that will reveal the truth about past atrocities, name perpetrators, provide redress for victims, and promote national healing and reconciliation. Kenyans believe that a truth commission will renew the country's morality in politics, law, in the economy, and throughout the society. They want a state founded on the rule of law and respect for the human rights of every individual who resides in Kenya. In other words, Kenyans want a human rights state.

The Task Force is cognizant of the fact that a truth commission is an ad hoc, temporary institution. It is an instrument that should only be necessary once in the lifetime of nation. That is why the government should establish an effective and credible truth commission, one that will address past abuses, recreate the state, banish impunity, and set Kenya on an irreversible trajectory to democracy and respect for basic freedoms. If done right, the truth commission will accomplish all these purposes and genuinely make Kenya a twenty first century state. This would make Kenya not only a hospitable nursery for its residents, but it would also serve as a shining example to Africa and the world. Far too many Kenyans have been destroyed by the state. It is time to say never again.

The Task Force, after considering the views of Kenyans, recommends that a truth commission be established by a presidential order. The Task Force has made this recommendation because it believes that this is the most reliable, expedient, and effective route. It also recommends that a

truth commission be established soon, and, in any case, not later than June 2004. Further, that the truth commission be given all available powers under the Commission of Inquiry Act, Chapter 102 of the Laws of Kenya. The truth commission should be independent and empowered to make recommendations on lustration or barring offenders from public office, redress, and other corrective measures, including the reform of the state and society. It should also have the power to negotiate with perpetrators over the return of stolen wealth in exchange for recommendations of a conditional amnesty or immunity from prosecution.

The Task Force is aware that a truth commission is a delicate and emotive institution for any country. That is why the Task Force has designed a distinctly Kenyan institution, taking into account the country's history and its political circumstances. The truth commission cannot – and must not – be an instrument of persecution or witch-hunt. But nor can it be a whitewash. It cannot target particular individuals or communities; otherwise its purpose will be defeated. The truth commission should be an instrument for the reform of the state, and for creating a more perfect nation. It must heal the wounds of our citizens and reconcile the nation. But to do so, it must dig into the past, recognize victims, provide justice, and promote national unity and reconciliation. That is why the Task Force strongly recommends that the government heeds the sovereign will of the people and immediately establishes a truth commission.

Finally, the Task Force believes that this report belongs to the people of Kenya. It is their path to a new Kenya, a country that they will be proud of. The Task Force urges Kenyans to stand guard over the establishment and the work of the truth commission. The Task Force urges all Kenyans, especially political parties, religious organizations, civil society, the private sector, and government officials to support the work of the truth commission. We also ask the international community to support this monumental national endeavor. In sum, the Task Force is proud to present this report to the government and believes that our journey to a better tomorrow will be made more certain by the establishment of a truth, justice, and reconciliation commission.

CHAPTER 1: OVERVIEW

Section 1. EXECUTIVE SUMMARY

On April 17, 2003, the Republic of Kenya appointed the Task Force on the Establishment of a Truth, Justice, and Reconciliation Commission. Its mandate was to find out if a truth commission was necessary for Kenya, and, if so, to make recommendations on the type of truth commission that ought to be established. The Task Force has drawn its conclusions and recommendations from a comprehensive and open process of fact-finding, research, public hearings, written submissions, data collection, interviews, consultations, a national conference, an international conference addressed by, among others, Archbishop Desmond Tutu, Professor Ali A. Mazrui, Professor Henry Steiner, and Justice Albie Sachs, and deep deliberations and reflections among its members. The process and methodology adopted by the Task Force put the sovereign will of the Kenyan people at the centre of its activities. Above all, the Task Force has been guided at all times by Kenya's national interests and the unequivocal belief that Kenya must become a human rights state so that all those who live in it can realize their full potential as human beings.

The Task Force is aware that the question of a truth commission is an emotive issue for the country. At the same time, the Task Force believes that the quest for democracy, economic prosperity and development are difficult tasks for which there are no shortcuts. Difficult choices have to be made by the people and government of Kenya if democracy, the rule of law, economic renewal, and respect for human rights are to become a reality. It is now an internationally acknowledged fact that transitional justice is an inescapable imperative for countries emerging from decades of gross misrule, abominable human rights violations, and large-scale plunder of public resources, shameless graft, and theft of public wealth.

Equally indisputable is the fact that a ravaged state, such as Kenya, cannot be recreated without an agenda for transitional justice to end public corruption and prevent human rights abuses. But transitional justice cannot be achieved unless the mistakes and atrocities of the past are properly, fairly, and comprehensively investigated, the perpetrators held accountable, and victims recognized and their dignity restored. In other words, the past must be confronted, the state must be audited, and the country must be exorcized of the ghosts of the past that still haunt it. Amnesia would simply lead to the certain death and failure of state and society.

It is important to state, however, without fear of contradiction, that the question of transitional justice is not a matter of theory or the concern of only academics and human rights advocates. It is a time-tested vehicle for national recovery and reconciliation. It is the one, and the only, option for banishing impunity from the national practice and psyche. No one, especially the head of state, or any other official, is above the law. Respect for the rule of law must start with the chief executive, for it is the head of state that is the embodiment of the sovereignty and legality of the state. In fact, successful transitions in other countries have dealt with the question of impunity for former officials, including heads of state, without fear or favor.

In South Africa, for example, former President Nelson Mandela was subjected to sustained scrutiny by the courts on any number of matters. It is an undeniable fact that the unrivalled reverence, unprecedented, and iconic status that Mr. Mandela enjoys in the world today is largely attributable to the respect that he showed for the rule of law and the transitional processes that he set in motion. Elsewhere, in South Korea, Chile, and now in Zambia, former heads of state have been subjected to judicial and other forms of official investigation for abuse of office and theft of public resources. Former public officials who plundered their economies and committed atrocities have nowhere to run because of the emerging jurisprudence of universal jurisdiction, which is evidenced by the creation of the International Criminal Court.

The work of the Task Force has been guided by all these considerations, although it must be clearly stated that the Task Force itself does not have any views that are independent from those of the people of Kenya. The conclusions of the Task Force are those of the majority of Kenyans who submitted their views to the Task Force, and which conclusions the Task Force believes are a reliable barometer of the opinion of the majority of Kenyans. It is encouraging, and a testimony to the maturity of Kenyans, that their views comport with the views of the international community and those of international law. This is all the more fitting because in December 2002, Kenyans overwhelmingly rejected despotism and kleptocracy. They peacefully brought about regime change for the first time in forty years through the power of the ballot. A rare occurrence in the troubled states of Africa, the December 2002 elections marked real and fundamental regime change, and set in motion a break with a past marked by illiberalism, atrocities, and impunity.

The establishment of the Task Force, the anti-corruption campaign, the Judicial Commission of Inquiry into the Goldenberg Affair, which has revealed the massive looting of the public purse by officials of the former regime, the requirement for the declaration of wealth by public officials, the determination to create a new constitutional dispensation, the reformation of the judiciary, the dramatic shift in public discourse, and the stated commitment by President Mwai Kibaki to foster a rule of law state are irrefutable testimonials of a break with the past and the undeniable transition which the state has embarked on.

The people of Kenya have spoken, and it is the obligation of the Task Force to faithfully report on what Kenyans have told it. Kenyans have asked their government to immediately establish a truth, justice, and reconciliation commission. They have overwhelmingly said that the truth about the past must be known, that perpetrators must be identified and punished, that victims must be accorded justice, and that reconciliation is only possible after the truth is known and justice is done. Kenyans want an effective and credible truth commission, an institution that will not engage in a witch-hunt or a whitewash. Such a commission must have the powers to recommend lustration, that is, to bar offenders from holding public office. It must be empowered to recommend redress for victims, such as compensation, restitution, and reparations. It should be authorized to inquire into stolen property and funds, and to recommend that they be returned to the public or the individuals from whom they were stolen. The truth commission should investigate gross human rights violations and economic crimes and recommend prosecutions. The truth commission should be established before June 2004, be independent, and be fully supported by the state. It must make recommendations on measures that must be implemented to prevent a recurrence of past abuses.

Such a commission should last anywhere from 1-2 years and be composed of commissioners who are beyond reproach. The truth commission must have the power to summon anyone and investigate any person in connection with past atrocities and abuses.

Section 2. TERMS OF REFERENCE

On April 17, 2003, by a special issue of the Kenya Gazette, the Government of the Republic of Kenya through Hon. Kiraitu Murungi, the Minister for Justice and Constitutional Affairs, appointed the Task Force on the Establishment of a Truth, Justice, and Reconciliation Commission. Professor Makau Mutua, who is also the Chairman of the Kenya Human Rights Commission, chaired the Task Force. The Task Force was set up four months after the ascension to power of the National Rainbow Coalition under President Mwai Kibaki.

The terms of reference of the Task Force were to recommend to the Minister for Justice and Constitutional Affairs whether the establishment of a truth, justice, and reconciliation Commission was necessary for Kenya. If so, the Task Force was mandated to recommend to the Minister how and when such a commission should be established; the membership of such a commission; the terms of reference of such a commission; the powers and privileges that should be conferred upon the commission in the execution of its mandate; and the historical period to be covered by the commission's investigations. The Task Force was empowered to make such further recommendations incidental to the foregoing, as it may consider necessary. It also was given all the necessary or expedient powers for the proper execution of its mandate.

The Task Force was mandated to hold public meetings in any locations of its choice for the proper discharge of its functions. Further, the Task Force was authorized to determine all questions before it, including the adoption of its final report, which would be by a simple majority of the members present. Among its other mandates, the Task Force was authorized to receive views from members of the public and oral and or written submissions from any person with relevant information. It could use any official reports of any previous investigations relevant to its investigations, and it could carry out or cause to be carried out any such studies, research, and evaluations of the experiences of other countries where truth commissions have been established. The Task Force was required to submit its final report to the Minister by August 31, 2003.

The Task Force was composed of the following members: Professor Mutua, the Chairperson, Rev. (Dr.) Timothy Njoya, the Vice Chairperson, Rev. Mutava Musyimi, Bishop (Prof.) Zablon Nthamburi, Rev. Patrick Rukenya, Mr. John Githongo, the Permanent Secretary for Ethics and Governance or his representative, Mr. Kairichi Marimba, Mr. Tirop Kitur, Mr. Julius Sunkuli, Ms. Raychelle Omamo, Ms. Jane Kiragu, Dr. Josephine Ojiambo, Ms. Mumina Konso, Mr. Davinder Lamba, Dr. Amukowa Anangwe, Ms. Zarina Patel, Mr. Kibe Mungai, Sheikh Ali Shee, and Ms. Roselyne Lagat-Korir, the Task Force Secretary. The Secretariat staff of the Task Force was composed of three lawyers, Ms. Jennifer Wanjiku Miano, a Senior Program Officer seconded to the Task Force from the Kenya Human Rights Commission, Mr. Ronoh Tuimising from the Office of the Attorney General, and Ms. Wanza Kioko, a consultant from CLARION.

Section 3. PROCESS AND METHODOLOGY

Immediately upon its official launch on May 11, 2003, by the Minister for Justice and Constitutional Affairs, the Task Force produced its work plan to effectuate its mandate. The main challenge of the Task Force was to ascertain the views of Kenyans on the necessity of a truth commission. It was then to advise the state on the institutional architecture of a truth commission according to the views of Kenyans. The Task Force devised a comprehensive process and methodology for establishing the views of Kenyans with respect to a truth commission. Although the Task Force was cognizant of the fact that Kenyans had recommended the formation of a truth commission to the Constitution of Kenya Review Commission (CKRC), it nevertheless was determined to solicit the views of Kenyans afresh so that it makes its recommendations to Kenyans without the fear of contradiction. To this end, it conceptualized and carried out a number of activities and events to make sure that all competing views on the subject were heard, digested, and analyzed.

The Task Force disseminated and publicized its work and mandate, which it considered to be crucial and of national significance, through the press and other fora so as to effectively reach the public. Hence, the Task Force immediately embarked on a public information campaign to publicize the terms of its reference. The Task Force held its first press conference after the completion of its work plan to advise the country of its purpose, activities, and events, and invited Kenyans to engage it. It requested every Kenyan with a view about a truth commission to make that view known to it. But in order to reach the widest scope of Kenyans, the Task Force produced a comprehensive schedule of visits to every province in the country.

During the provincial visits, the Task Force held publicized and open public hearings at town halls and other open theatres. Such visits were announced in the local, national, and even international print and electronic media. The provincial, district, and local authorities widely publicized the hearings. Churches, human rights groups, veteran organizations, Mosques, development groups, women's organizations, farmers' groups, teachers, local and national politicians, as well as individual Kenyans helped mobilize the citizenry for the public hearings. As a consequence, many Kenyans turned out in large numbers in many locations to give their views before the Task Force. On the average, the Task Force held public hearings in at least three districts in every province. Hearings were held in Nairobi, Nakuru, Molo, Narok, Eldoret, Mombasa, Garsen, Kisumu, Kisii, Gucha, Kehancha, Kapsakwony, Kakamega, Machakos, Meru, Wagalla, Garba Tula, Isiolo, Garissa, Wajir, Nyeri, Murang'a, and Kiambu.

In the course of the provincial visits, the Task Force listened to hundreds of Kenyans, talked with many more, and saw numerous sites of interest to a truth commission process, such as the Wagalla Airstrip where the Wagalla Massacre took place. The Task Force also received views from numerous provincial, district, and local administrators on a truth commission. Suffice it to note that the public hearings were emotive, candid, and open. The hearings would start in the mornings and go on until dusk. On the whole, the hearings were well attended, although the numbers of women was low. The Task Force went out of its way to encourage and recognize women speakers and persons with disabilities. But many important opinion-makers including common citizens, victims of violations, few numbers of perpetrators, members of parliament, local politicians, religious leaders, former public officials, journalists, housewives, pastoralists, the poor, the well-to-do,

businesspeople, teachers, students, farmers, the unemployed, the self-employed, persons with disabilities, government officials, groups representing institutions and organizations, and a host of other Kenyans presented their views before the Task Force. Many made oral presentations and others gave written submissions. The majority spoke in English and Kiswahili, yet others expressed themselves in their local languages for which translators volunteered. Kenyans showed enthusiasm for the creation of institutions to deal with the abuses of the past. After the initial introduction of the Task Force and its terms of reference by the chair, presenters were keen to make submissions. In all, the Task Force was extremely impressed with the decorum and civility with which the speakers conducted themselves.

The Task Force was deeply concerned by the low numbers of women who turned up at its public hearings to make submissions. Although the Task Force encouraged the few women present to speak up, this problem will have to be addressed once the truth commission is set up so that the issues that are particular to women are adequately dealt with. Kenya, like most countries, has deeply embedded prejudices, policies, and traditions that have historically marginalized women and made them invisible in the public square. Discrimination against women, violence, rape, and the patriarchy have consigned women to the margins of society. Human rights violations and the economic crimes committed by the state have a special gendered effect on women. That is why violations against women have disproportionately multiplied adverse effects and are rarely addressed. A truth commission must pay particular attention to the participation of women and the abuses perpetrated against them. Otherwise, a truth commission will have little or no beneficial value in addressing the plight of women.

The work of the Task Force was constrained by several factors, including time limitations, the wide geographical stretch of Kenya, and limited audiences. These constraints notwithstanding, the hearings, which were open to all, provided a reasonable barometer of the nation's pulse. Many who wanted to speak expressed themselves at the hearings. Speakers were recognized without any bias, except for gender and disabilities, and only the limitation of time allotted for the hearings prevented more presentations. Kenyans of all ethnicities and races, creeds, religions, age, sex, education, political affiliation, and other classifications presented their views before the Task Force without let or hindrance. By far the provincial visits reached the widest scope of Kenyans and gave citizens the most transparent and easily accessible fora to air their views. The Task Force took copious notes of all public hearings and tape-recorded the majority of them. It kept precise and accurate records of all those who attended, all those who spoke, and what they said. It prepared verbatim reports of all the presentations. It has produced statistics, charts, and other pictorial graphics of the hearings. These statistics and views form one of the fundamental bases for the findings, conclusions, and recommendations of this report.

Conferences have formed the other key bases for this report. In July, the Task Force organized a highly successful national two-day conference on a truth commission in Nairobi. The conference, which was opened by the Minister for Justice and Constitutional Affairs, and addressed by senior members of government, hosted speakers from civil society, the clergy, commissioners of the CKRC, the Law Society of Kenya, members of parliament, common wananchi, victims, policy-makers, women's organizations, senior academics, the youth, and Kenyans from all walks of life.

They vigorously interrogated the need for a truth commission for Kenya and ended the conference with a strongly worded resolution calling for a truth, justice, and reconciliation commission. The conference gave Kenyans a chance to publicly debate the necessity of a truth commission for Kenya in one setting.

In August, the Task Force organized a highly successful international conference on a truth commission. The purpose of the international conference was to allow Kenyans an opportunity to learn from the experiences of truth commissions in other countries. The idea was to inform Kenyans so that they can make a mature and deliberate choice given prior experiences. The conference was addressed by, among others, Archbishop Desmond Tutu, the revered cleric who chaired the South African truth and Reconciliation Commission. It was also addressed by Professor Ali Mazrui, an internationally renowned scholar, Professor Henry Steiner of Harvard Law School and one of the most respected human rights scholars, Justice Albie Sachs of the Constitutional Court of South Africa, Professor Issa Shivji of the University of Dar-es-Salaam, and Dr. Alex Boraine, who was the vice chair of the South African Truth and Reconciliation Commission. Other speakers included leading academics, such as Professor Chris Peter of the University of Dar-es-Salaam, renowned religious leaders, senior lawyers, and human rights advocates, internationally acclaimed academics and policy-makers from Kenya and abroad, members of parliament, and other highly distinguished speakers. The conference was inspiring, emotive, and informative. It afforded Kenyans an opportunity to appreciate the necessity and complexity of a truth telling and justice seeking process. But it also made clear that a truth commission is one mechanism for cleansing and transforming the moral and political fiber of the nation.

Written submissions have also formed a significant component of the database of this report. The Task Force was aware that not every Kenyan could make oral submissions before it. It therefore announced through the media, in its public hearings, and elsewhere, that Kenyans were encouraged to send written submissions to its postal address, through its fax number and email addresses, and in person at the Task Force offices at NSSF Building in Nairobi. In fact, written submissions were handed in at public hearings and sent by mail, both postal and electronic, and brought to the offices in person. Many submissions came from individual persons, religious organizations and other organizations. Some were even sent to the Task Force from as far as the United States. The vast majority of the written submissions are serious and considered documents that address issues of human rights violations, economic crimes, and matters pertinent to the mandate and terms of reference of the Task Force.

The report also draws from commissioned papers by individuals who have studied truth commissions. These papers have been invaluable for the Task Force in its quest to understand what benefits and problems truth commissions in other countries have yielded. The Task Force has benefited from literature review and the compilation of an annotated bibliography on truth commissions. The review of scholarly works and literature has therefore formed the other foundation of this report.

Finally, both the electronic and print media have been an indispensable partner in disseminating the work of the Task Force and providing civic education to members of the public. The Task Force through the Chair has conducted numerous interviews with the media, explaining the role and purpose of truth commissions. Different media houses have reported extensively on the quest for a truth commission for Kenya. Many Kenyans have taken positions on a truth commission based on these reports. There is little doubt that many Kenyans are now aware of the roles of truth commissions.

This report is a product of all these efforts by the Task Force. The report is based on the findings and analyses of the views expressed by Kenyans during the provincial visits, written submissions from individuals, groups, and institutions, the national and international conferences, literature review, commissioned papers, and individual and group conversations with Kenyans.

Section 4. RECOMMENDATIONS

These recommendations of the Task Force on the Establishment of a Truth, Justice, and Reconciliation Commission are made pursuant to its terms of reference as follows;

1. That the Government of Kenya establishes a Truth, Justice, and Reconciliation Commission (TJRC);
2. That the President of the Republic of Kenya establishes a TJRC pursuant to the powers granted him by the Constitution of the Republic of Kenya;
3. That the TJRC have all the powers provided for, and contemplated, in the Commissions of Inquiry Act, Chapter 102 of the Laws of Kenya;
4. That a TJRC must be established immediately, and in any case, not later than June 2004;
5. That the TJRC be composed of commissioners drawn from a cross-section of the sectors in Kenya, and that it be composed of not more than 11 commissioners;
6. That the commissioners and the chair be appointed by the President of the Republic of Kenya after consultations with all stakeholders by the Minister for Justice and Constitutional Affairs;
7. That the commissioners be persons of high moral integrity, particular attention being paid to their knowledge and commitment to human rights and transitional justice;
8. That the TJRC be independent, fully funded by the state, and fully supported by the state;
9. That the TJRC have the power to make its own rules of procedure and compose its own secretariat;
10. That the TJRC have the power to determine its own schedule and work plan;
11. That the TJRC holds, unless it deems it necessary, all its sessions in public, which must be carried live on radio and television;
12. That the TJRC have the power to summon and compel any person to appear before it and provide testimony or answer questions;

13. That the TJRC have the power to investigate human rights violations and violations of economic, social and cultural rights;
14. That the TJRC have access to all government reports and other records as well as any evidence that it deems necessary for the discharge of its functions;
15. That the TJRC have the power to recommend redress such as restitution, compensation, and reparations;
16. That the TJRC have the power to recommend lustration or the barring of offenders from holding public office;
17. That the TJRC have the power to track down stolen public property and funds and recommend their return to the state or the individuals from whom they were stolen;
18. That the TJRC be empowered to negotiate with perpetrators of economic crimes for the return of stolen property and funds in exchange for recommendations of limited amnesty and immunity;
19. That the TJRC have the power to recommend prosecutions of offenders;
20. That the TJRC cover the period from 1963-2002;
21. That the TJRC shall endeavor to create a conducive environment for women and children to appear before it and address it;
22. That the TJRC and its commissioners enjoy immunity from prosecution or any other liability in the discharge of their functions;
23. That the chair of the TJRC enjoy the status of a judge of the Court of Appeal, and the commissioners that of the judge of the High Court;
24. That the TJRC enjoy all other privileges and immunities necessary for the discharge of its functions;
25. That the TJRC, in its final report, which shall immediately be made public, makes any other recommendations that it deems fit for the reform of the state;
26. That the Government of Kenya establishes a committee or similar institution to examine the atrocities of the colonial period and make recommendations on how they ought to be addressed.

CHAPTER 2. TRUTH COMMISSION AND TRANSITIONAL JUSTICE

Section 5. WHY KENYA NEEDS A TRUTH COMMISSION

Political History and Governance in Kenya

The political history and governance of the Kenyan state is a catalogue of gross human rights violations, the arrogance of power, and the commission of mind boggling economic crimes. Constitutionalism and the rule of law, which are the central features of any political democracy that respects human rights, have been absent in Kenya's history. A democracy is defined by an executive that is accountable and freely elected, a government limited by popular will, and which the people can remove from power through the ballot. The second essential component of democracy is a vibrant and freely and fairly elected legislature in an open contest pitting various political parties against one another. Finally, in a state governed by the doctrine of separation of powers, an independent judiciary, the essential guardian of the rule of law, is the linchpin of the scheme of checks and balances through which the independence of the three arms of the state is assured.¹ Otherwise, there is no other guarantee that the executive – the “government” – will respect the rule of law and act within established legal norms, processes, and institutions. The constitution is thus not merely hortatory but the fundamental and supreme law of the land, the real and living document that guides, defines, and permits all actions by the state. No individual or official of the state is above the law or can act in defiance of constitutional prescriptions. This is what separates democratic states from undemocratic ones. It is the difference between tyranny and freedom.

Since its creation by the British in 1895, the Kenyan state has largely been a predatory and illiberal instrumentality, an ogre defined by its proclivity for the commission of gross and massive human rights violations. Little need be said of the colonial state, which was specifically organized for the purposes of political repression to facilitate economic exploitation. In 1963 Kenya formally became an independent, sovereign state, ending decades of direct British colonial rule.² Kenya's post-independence history, however, has been marked by sharp contradictions between the state and the civil society in spite of the image, cultivated in the West during the Cold War, that the east African state was the beacon of hope for Africa. The post-colonial state has engaged in the most abominable human rights violations and economic crimes known to humanity. Not even the re-introduction of multi-partyism in 1991, and the two general elections in 1992 and 1997, the first of their kind in decades, brought relief from state-directed human rights violations and the wanton and shameless theft of public coffers and property, evils that became the trademark of the Kenya government.

Kenya's 1963 independence constitution provided for a multiparty democracy, a freely elected bicameral parliament, and guaranteed judicial independence.³ In spite of the liberal constitution, the post-colonial state was autocratic at its inception because it inherited wholesale the laws, culture, and practices of the

¹See Henry J. Steiner & Philip Alston, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 711-12 (1996).—

²Africa Watch, *KENYA: TAKING LIBERTIES* 5 (1991).

³See H. W. O. Okoth-Ogendo, “Law and Government,” in *KENYA: AN OFFICIAL HANDBOOK* 27-35 (Republic of Kenya: Ministry of Information and Broadcasting, 1988).

colonial state. In 1964 the opposition Kenya African Democratic Union (KADU), under the leadership of Daniel Toroitich arap Moi, President of Kenya since 1978, voluntarily dissolved and joined the ruling Kenya African National Union (KANU), headed by the nation's first African head of state, the late Mzee Jomo Kenyatta. The merger made Kenya a *de facto* one-party state and paved the way for a despotic executive.⁴

In the absence of a legalized and official opposition, although the constitution allowed parliamentary democracy, President Kenyatta quickly created a highly centralized, authoritarian republic, reminiscent of the colonial state. Although Oginga Odinga, then Vice President, broke ranks to form the opposition Kenya Peoples' Union (KPU), President Kenyatta outlawed it in 1969 and detained all its principal leaders.⁵ Upon President Kenyatta's death, Vice President Moi succeeded to the presidency in 1978. President Moi then took a number of important measures to consolidate personal rule. The net effect of these measures was to heighten repression and dramatically curtail all freedoms. Significantly, mismanagement, official corruption, and graft skyrocketed. The national economy spiraled into a precipitous decline.

In June 1982, after popular calls for an open political system, President Moi pushed through the single party parliament a constitutional amendment making Kenya a *de jure* one-party state.⁶ Several months later, an aborted coup by a section of the Kenya Air Force produced in President Moi a determination to crush all dissent and concentrate all power in his hands. From then on, President Moi worked to perfect the repressive state crafted by President Kenyatta. Thereafter, the Party and the state became one. Through the government and KANU, he exercised extensive and deep control over civic groups, trade unions, the press, the parliament, and most critically the judiciary. Political murder, politically-instigated ethnic clashes, detention without trial, arbitrary arrests and detentions, false and politically motivated charges of opponents, both real and imagined, became the business of the state. The State, KANU officials and their agents committed crimes with impunity. Laws and constitutional amendments, which abrogated due process protections and the independence of the judiciary, were passed with little or no parliamentary debate.

Even after the authorization of open political competition in 1991, President Moi and KANU continued to resist the installation of democracy. The government used all its resources to frustrate a genuine transition to democracy. Starting in 1992, the state periodically engineered and orchestrated inter-ethnic violence, particularly against communities that supported opposition political parties. The police and security forces constantly invoked colonial-era legislation to restrict the activities of the press and civic and human rights groups. The judiciary, which lacked independence, and was viewed by Kenyans as subservient to the executive, continued to be a captive instrument of repression. Even as the opposition united against KANU in 2002, Mr. Moi

⁴See Makau wa Mutua, *Human Rights and State Despotism in Kenya: Institutional Problems*, 41 AFRICA TODAY 50 (1994). See also Jennifer Widener, *THE RISE OF A PARTY STATE IN KENYA: FROM HARAMBEE TO NYAYO!* (1992).

⁵International Commission of Jurists, *DEMOCRATISATION AND THE RULE OF LAW IN KENYA* 11 (1997).

⁶In 1982, President Moi forced a constitutional amendment, making Kenya officially a one-party state. It provided that "There shall be in Kenya only one political party, the African National National Union." See Section 2A, CONSTITUTION OF KENYA (AMENDMENT) ACT NO. 7 OF 1982.

was still engaged in repressive tactics and the unlawful use of state machinery to stifle the opposition. But the writing was clearly on the wall.

On December 27, 2002, Mr. Mwai Kibaki, a former Vice President under former President Moi, and leader of the largely united opposition, was overwhelmingly elected President of Kenya, ushering in regime change in an historic election that decisively ended the 24-year reign of President Moi. Those elections offered Kenyans a genuine opportunity to construct a democratic state and to confront the abuses of the past.

Human Rights Deficit

Over its forty-year rule of Kenya, KANU failed to foster a culture of the rule of law and respect for human rights. The list of human rights violations and economic crimes is too long to tabulate. But the most severe have included political assassinations, torture and detention without trial, police brutality, massacres of communities, sexual abuse and violence against women and girls, politically instigated ethnic clashes, and a host of economic crimes such as the looting of the public purse and land grabbing. All these violations were perpetrated in spite of the fact that the Kenyan constitution guarantees on its face fundamental rights. Over time, the government substantially eroded and weakened many of the safeguards since independence. The Bill of Rights⁷ gives individuals basic rights but then restricts them with qualifying limitations, otherwise known as claw back clauses.⁸ Derogations from the Bill of Rights are also permitted during an emergency.⁹ The first major blow to the rule of law came in 1966 when the nascent state passed the Preservation of Public Security Act (PPSA),¹⁰ in essence re-enacting colonial detention laws. Under the PPSA, the government detained scores of its outspoken critics, tortured and harassed their spouses, children, and relatives, and in the process stifled calls for democratic change and an open society. Although on its face constitutional – and even formally a democracy since 1992, the Kenyan state was in reality until 2002 highly repressive and authoritarian, trapped in the culture of the one-party state.

In a revealing admission of lawlessness, Attorney General Amos Wako, stated in 1991 that “a characteristic of the rule of law is that no man, save for the president, is above the law.”¹¹ As noted in 1997 by the respected Geneva-based International Commission of Jurists, the “Executive is still an overarching and predatory institution shadowing and preying upon the other two constitutionally co-equal branches of government – the Legislature and the Judiciary.”¹² Indeed, the last decade of

⁷Sections 70-83, CONSTITUTION OF KENYA.

⁸For instance, Section 76(1), CONSTITUTION OF KENYA, protects individuals against arbitrary search and entry but then Section 76 (2) qualifies such protection, in part, in the following language:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention with of this section to the extent that the law in question makes provision (a) that is reasonably required in the interests of defense, public safety, public order, public morality, public health, town and country planning, the development and utilization of mineral resources, or the development and utilization of any other property in such a manner as to promote the public benefit.

⁹Section 83, CONSTITUTION OF KENYA.

¹⁰CAP. 57, LAWS OF KENYA.

¹¹*The Rule of Law Will Prevail*, WEEKLY REVIEW, July 12, 1991, at 26 [reprint of the Attorney General’s first speech to parliament].

¹²International Commission of Jurists, DEMOCRATISATION AND THE RULE OF LAW, *supra* note 5, at 19.

multi-partyism witnessed the increased fragmentation of Kenya and the escalation of the divide-and rule tactics of the Moi government. State despotism sapped the energy of virtually all sectors of society – the parliament, the political opposition, trade unions, non-governmental organizations, the press, and opposition political parties – through political killings, intimidation, harassment and sexual abuse of women, girls, and children, religious discrimination, official corruption, arbitrary arrests and the persecution of political opponents. Additionally, the state pursued deliberate policies of marginalisation and exclusion and perpetrated injustices with particular reference to land distribution and access to economic resources.

Kenya is in a transition to democracy. But that transition will be stillborn unless Kenya creates institutions to cultivate the rule of law and a culture that promotes and protects human rights. In its transition to democracy – and the next five years will be pivotal – Kenya must unequivocally and with uncompromising determination first reverse the corrupted soul created by KANU and then reconstruct the state from the ground up. Kenya's political, legal, economic, social, and cultural renaissance must recreate both the state and the society in their entirety. Human rights are the device for the realization of human dignity. The corpus of human rights norms stands between the tyranny of power and the indignity of powerlessness.

The responsibility for the realization of multi-partyism and human dignity has been borne by the Kenyan people. Examples include the struggles waged by the civil society, religious organizations, individual politicians, and other Kenyans. It is at this delicate intersection that human rights standards must be deployed to reform and de-fang the state. But human rights norms must do more. They must contain the demonic proclivities of the state and turn it into a living nursery for the growth and development of every one of its citizens and residents. But the state will not accomplish these tasks unless it understands human rights in their robust, full, and liberating potential and scope. That is why human rights must be understood in their totality. These include not only the vaunted civil and political rights, which are essential for the rudiments of political democracy, but also the much-maligned economic, social, and cultural rights, which are the critical building blocks for social democracy.

Kenya and Transitional Justice

In the last two decades, the concept of transitional justice has come to represent the midwife for a democratic, rule of law state. The script for the construction of such a phase is now regarded as an indispensable building block for constitution-making, peace-building, and national reconciliation in states emerging out of dictatorship. In fact, policy-makers and statesmen now increasingly realize that a human rights state – a political society that internalizes human rights norms – cannot be created unless the society concretely addresses the grievances of the past. The truth commission has become the effective tool for addressing the abominations of the past.

The term transitional justice captures two critical notions. First, it acknowledges the temporary measures that must be implemented to build confidence for the construction of a state ravaged by human rights violations and the plunder of public resources. Secondly, by its own definition, it rejects the application of any rigid set of norms or criteria as a beachhead to the future. In other

words, transitional justice calls for deep concessions on either side of the divide, between victims and perpetrators. No single party or faction can be fully satisfied. Non-concessionary demands or non-conciliatory denials can only foil the truce that is essential for national reconstruction. But equally important is the realization that transitional justice does not mean impunity for the most hideous offenders, for to do so would be to encourage a culture of unaccountability for past abuses. Hence a balance must be struck between, on the one hand, justice for the victims and some form of retribution against some of the offenders, and on the other hand, a measure of magnanimity and forgiveness on the part of victims. This is the plausible path if reconciliation is to become a reality.

The world now lives in extraordinary times during which most societies are in a state of transition. For most states in Asia, Africa, Latin America, and East/Central Europe, the transition is from controlled, single party, or military regimes into more open societies based on constitutionalism and respect for human rights. In the more established political democracies in the West, the challenges include transitions to more diverse societies and the role of the state in a variety of social guises. In either case, every country is today faced with the challenge of some form of transition or other. But how will these transitions be managed, and what or who will assist in these monumental changes?

The vast majority of states do not have adequate human and material resources to effect meaningful transitions. Yet there are not enough or appropriate international institutions that can effectively respond to these needs. This means that most states will have to look inward for resources and personnel to effect their transitions to more humane societies. Thus new governments must craft well thought out transitional agendas and programs to recreate the state. Laws, policies, and public institutions have to undergo radical and substantive transformation. New institutions may have to be created, while some old ones may need to be abolished or reformed. The culture of the public service and the citizenry in general has to undergo deep transformation if the new state is to be realized. In short, a society cannot fundamentally change if the transition from autocracy and the plunder of public resources to democracy does not become a reality. For Kenya, the truth commission could be the central vehicle for implementing the project of transitional justice.

The truth commission is a relatively new institution in the universe of law and justice; it is about two decades old as a vehicle for transitional justice. Each country where it has been established – starting in Argentina and later in Uganda, South Africa, El Salvador, Chile, Argentina, Peru, Ghana, Sierra Leone, among others – has had to improvise and craft an institution that was determined by the particular country's traumatic history and the balance of the political forces. That is why there is no model truth commission anywhere that Kenya can simply mimic. Kenyans should learn from the experiences of all these countries, and decide the type of a truth commission they desire to establish mindful of the complexities of Kenya's particular history.

The truth commission is now an internationally familiar conception and institution for a state emerging from a period of gross human rights abuses and abominable economic crimes and

debating how to address them. The term truth commission serves as the generic designation of a type of governmental organ that is intended to construct a record of this tragic and barbaric history. Thus truth commissions offer countries ways of responding to years of bare-knuckled barbarism, of horrific human rights violations that took place for political, ethnic, religious, tribal, economic class, ideological, gender, and other conflicts over justice, power, and the control of economic resources.

Truth commissions may be an alternative to other national responses to these abuses. At one extreme, these responses could include criminal prosecutions, and on the other, the granting of blanket amnesties to the perpetrators. Key actors to addressing past abuses include traditional, religious, and civic organizations. Truth commissions are established for gross human rights violations that normal courts cannot, are unwilling, or are unable, to address. Each country must decide where a truth commission fits between each of these two poles, those of amnesty and prosecution. Truth commissions are created principally at the time of a state's transition toward a more democratic and participatory government, a government that espouses the ideals of democracy, of power bounded by law, of formal legal equality, and social justice. It matters not how the moment of political change occurred; it could have been violent or non-violent, such as Kenya's. What matters is that there is a normative and substantive departure by the successor government or state from its predecessor. Thus it could be change from autocracy to democracy, from opacity to transparency, from open shameless graft to fiscal and economic accountability. But that change must be structural, ideological, and fundamental; it cannot be a continuation of the same. The change must signal real and genuine regime change.

Truth commissions seek multiple objectives, which are all interrelated. They can act as a sort of a national catharsis in which the country goes through a deep and penetrating process of cleansing the past. This function is akin to therapy. It can perform the function of moral reconstruction, in which a country takes stock of its morality in politics, governance, cultural values, and its view of humanity. Moral reconstruction implies learning lessons from the past and revising the nation's moral code. It could be a vehicle for reconciliation after truth and justice have been told and done. Here, society must pass judgment on what it has heard; it must, in effect, establish a moral account of the historical record.

Another function, which is probably the most important one, is that of truth telling, where the perpetrators bare all, and the victims recount the horrors visited upon them by the sadism of the state. From this truth, several options are available: a society may choose to forget or ignore the truth, gloss over it, or use it to sanction the perpetrators and deploy it for the moral and political reconstruction of the state. Some commissions seek the truth, others justice or reconciliation, and some all three. Most truth commissions are victim-centred; victims must be allowed to express themselves in the language of their choice.

Many Kenyans seek redress and justice for past violations, yet others are committed to a journey of forgiveness and reconciliation. Some victims of past abuses have asserted that they may only contemplate forgiveness after a full public accounting and justice have been done. The majority of Kenyans have stated that as a rule of law regime, the Kibaki-led NARC government cannot be

business-as-usual, and allow criminals to get away without facing the law and due process. The 2002 elections gave Kenya an opportunity to recreate the state, build democratic institutions, and inculcate a democratic culture. That is why a competent and effective truth commission, established by a new government, would go a long way in restoring confidence in Kenya and lifting it from the ranks of the most undesirable countries.

In the Kenyan context, a truth commission would have to be faithful to several variables. Firstly, it is important that the proceedings of the Truth Commission be carried live on radio and television countrywide. The commission should have the power to require any person to appear before it and completely submit to its instructions or be held in contempt and jailed. It ought to be empowered to facilitate, and, where necessary, initiate or coordinate inquiries into: gross violations of human rights and economic crimes, including violations which were part of a systematic nature; the nature, causes, and extent of gross violations of human rights and economic crimes, including the antecedents, circumstances, factors, context, motives and perspectives that led to the violations; the identity of all persons, authorities, institutions, and organizations involved in such violations; and establish whether the violations were the result of deliberate planning on the part of the state or any of its organs, or any political organization, official, or individual.

The truth commission should establish accountability - both political, moral, and legal - for the violations; facilitate, initiate, gather, and coordinate the collection of information and evidence from any person, including victims, which establish the identity of the victims of such violations, and their perpetrators; establish the fate and status of victims, and the extent of harm, suffering, or loss incurred by them; determine what compensation, reparations, and restitution should be awarded to victims, their families, and survivors; recommend the dismissal and barring from public service or politics of particular perpetrators; recommend the seizure, forfeiture, and surrender of illegally acquired property and other material goods, including money and other fiscal instruments; and make referrals to the Ministry of Justice and Constitutional Affairs or the Attorney General on the perpetrators to be prosecuted and sanctioned.

The commission's final report should be made public in its entirety. Additionally, the Commission should be given authority to recommend if a limited number of amnesties with qualified immunity ought to be granted to further the ends of its mandate. Ideally, the truth commission should last a maximum of two years.

CHAPTER 3: FINDINGS

Section 6. HOW AND WHEN TO ESTABLISH THE TRUTH COMMISSION

How Should a Truth Commission be Established?

The Task Force received varied views on how the truth commission should be established. Citizens offered three options by which the government could establish a truth commission. A truth commission could be established by a presidential order, through an Act of parliament, or by entrenching it in the Constitution. The Task Force admits there are merits and demerits for whichever method is adopted. But there are four elements or variables that are key to the choice that must be made. These are: the speed with which a truth commission ought to be set up, the powers that would be vested in it, the support that it would garner from various constituencies, and the ability or political will to set up the commission. After taking into account all these variables, and the views of Kenyans, the Task Force recommends that a truth commission be set up by a presidential order.

Many Kenyans felt that the truth commission ought to be established through an Act of Parliament. They felt that legislating a truth commission would give it adequate powers and insulate it from the whims of the executive, a fate that has all too often met past presidential commissions under KANU governments. But they also wanted a truth commission established immediately. The Task Force then had to reconcile these two positions. The Task Force rejected the legislative route because it is of the view that the Kenyan parliament has too many competing, vested, and self-protective interests that would delay, scuttle, or give the country a truth commission that would be devoid of any meaningful powers. Many members of parliament and some political parties are either ambivalent or hostile to a truth commission. The recent debate in parliament regarding the resettlement of clash victims is instructive in this respect. Taking the matter to parliament is certain to kill it or produce an anemic truth commission.

The Presidential approach, however, has the advantage of speed. The Judicial Commission of Inquiry into the Goldenberg Affair is the best example of the advisability of the presidential route. Besides, the executive's commitment to transitional justice, the fight against corruption, and the reform agenda is a strong indication that President Kibaki would set up an effective and independent truth commission. A strong presidential commission is a mitigating factor against the limitation on powers to prosecute, for example, but is still a far more preferable option. The Task Force is impressed by the Kibaki Presidency, and in particular its setting up and expansion of the Goldenberg Commission. This is a radical departure from the Moi Presidency and its treatment of presidential commissions, and hence the faith of the Task Force in recommending the establishment of a presidential truth commission.

The Task Force considered, and rejected, the suggestion that a truth commission be established by entrenching it in the constitution. First, the wisdom of the constitutional method is scant; a truth commission is a temporary institution that ought not to concern the constitution. Secondly, it is not certain when the new constitution would come into force. Third, the particular truth commission

institution contemplated in the draft constitution is a strange and unfocused vehicle for addressing past abuses. For all these reasons, and its unpopularity with Kenyans, the constitutional approach fails, and is not an acceptable method.

The Task Force therefore recommends that the truth commission be established by a presidential order under the Commission of Inquiry Act. The Task Force was also persuaded by the experiences of other countries in arriving at this conclusion.

When Should a Truth Commission be Established?

The views of Kenyans are unequivocal on the need for a truth commission to address past abuses. The Task Force has determined that there are high hopes and expectations among the people that the grievances of the past will be addressed. Kenyans also overwhelmingly told the Task Force that the government must make a clean break with the past. Citizens expect this break to be made urgently and soon so that the people can adjust and plan their lives in a new dispensation. It was clear from the views of Kenyans that human and economic rights violations are part of the horrible past, which must be urgently brought to a close. Thus the Task Force recommends that the truth commission be established no later than June 2004. This recommendation is informed by the fact that truth commissions are most effective when established within the first two years of political transitions or regime change, otherwise governments consolidate their power and retrogress to past practices.

The Duration of the Truth Commission

A truth commission is an intense, laborious, and expensive undertaking. It taxes the energies and resources of all concerned, be they victims, perpetrators, and the nation at large. A commission that takes a long time is not in the best interest of the country. The Commission must however have adequate time – neither too long nor too short – to discharge its mandate. Bearing in mind the experiences of other countries, the Task Force recommends that a truth commission for Kenya should last for 18 months, with the option by the president to extend its life for a terminal six months.

Section 7. THE MEMBERSHIP OF THE TRUTH COMMISSION

Since the December 2002 elections, Kenyans have sought more accountability from the state, particularly in appointments to public office. Kenyans now demand fair representation, consultation, and participation in official decision-making. That is why appointments to the truth commission must be beyond reproach. The Task Force is acutely aware of this matter, and has been faithful to the views of Kenyans in recommending the criteria for appointment to the truth commission. Thus the Task Force makes the following recommendations that pay attention to expertise, competence, gender, and the diversity of Kenya.

- The Commission should consist of 11 commissioners appointed by the President after consultations with all stakeholders by the Minister of Justice and Constitutional Affairs;

- The President, in appointing the members of the Commission, shall have regard to the integrity, sense of fairness, and ability of the appointees;
- The President, in appointing members of the Commission, shall ensure that more than one third of members shall be women; that no fewer than three members shall be religious leaders; that one third of the members shall be lawyers; and that at least one person with disability is appointed commissioner;
- The President shall make the appointment of the commissioners known by proclamation in the Kenya Gazette;
- The President shall designate one of the commissioners as the Chairperson, and another as the Vice-chairperson, of the Commission;
- The members shall be appointed as full-time officers for the duration of the Commission and shall enjoy the status of the judge of the High Court, except the Chairperson who shall be in the rank of a judge of the Court of Appeal;
- A member of the Commission may resign membership by written notice to the President and may be removed from office by the President for inability to perform the functions assigned;
- The President may remove a commissioner from office on the grounds of misbehavior, incapacity or incompetence, as determined by the vote of at least two-thirds of the Commissioners;
- Where a vacancy occurs in the membership of the Commission because of dismissal, resignation, disability or death of a member, the President shall appoint another person to replace the member

It is important to note that the size and composition of the truth commission are critical to its effectiveness. The Task Force realized during its public hearings that an effective truth commission should be broad enough to accommodate sufficient public representation and participation in its deliberations. That is why it has recommended that the truth commission be composed of 11 members to achieve these goals. The diversity of the country in terms of geography, ethnicity, race, creed and religion, age, gender, disability, profession, and social status should be key considerations in appointing members. The Task Force recommends that lawyers constitute one third of the commissioners because of the legal nature of the work of truth commissions. Expertise, integrity, and competence must be paramount factors in the appointment of commissioners.

Section 8. THE TERMS OF REFERENCE FOR A TRUTH COMMISSION

One of the least contested questions in the quest for a truth commission for Kenya relates to its terms of reference or the matters that it must address, that is, the types of violations that it must investigate. Although different communities, groups, and individuals around the country expressed particular preferences to the Task Force, there is no doubt about the functions that Kenyans want a truth commission to perform. Kenyans want a truth commission to perform four interrelated functions. These are establishing the truth about past atrocities by identifying the perpetrators and the reasons behind their actions; recognizing victims and providing justice or some form of redress for the harm and suffering inflicted on them by the previous governments; auditing the state and

suggesting corrective measures to avoid a recurrence of abuses; and creating an enabling environment for national reconciliation and healing.

But Kenyans are clear that these functions cannot be successfully performed unless established categories of human rights violations and economic crimes are fully investigated and addressed. While it is true that many horrible and unimaginable violations have been perpetrated by the state over the last forty years, the Task Force believes that a truth commission cannot investigate every human rights violation. The Task Force therefore recommends that a truth commission address certain categories of violations. The violations that ought to form the terms of reference of a truth commission must be those that indicate a systemic pattern or state policies, actions that were carried out as policies of the state to abrogate the rights of Kenyans. Thus a truth commission must have the discretion to decide which violations qualify for scrutiny. In any case, it is practically impossible for a truth commission to address more than several thousand cases. That is why the Task Force has identified individual cases and groups of violations that it believes ought to be the subject of inquiry. The Task Force has made this choice consistent with the views of Kenyans and with due regard to the purposes of an effective, timely, and the least burdensome truth commission. The Task Force recommends that a truth commission investigates six categories of human rights violations and economic crimes.

Political Assassinations and Killings

It is an undeniable fact that the Kenyan state has over the last forty years of the reign of KANU employed political murder as an instrument of silencing political dissent, stifling democratic opposition, and creating a despotic, authoritarian, and murderous state. The Task Force heard, over and over again, harrowing accounts of how prominent and ordinary Kenyans, whom the state deemed political dissidents, have been assassinated and murdered by the state over the years. It is a telling testimony of the state's planning and execution of dozens of assassinations and murders of political leaders and government critics that virtually no one has been held accountable for these killings.

The purpose of the killings, without doubt, was to eliminate political opponents and all those who would oppose the monopoly of power enjoyed by KANU from 1963 to 2002. Kenyans are united in their demand that political murder must never again be an instrument of state policy to silence political dissent or government critics. Kenyans want the perpetrators of political killings investigated and called to account, their victims recognized, and justice done. Impunity for these killings must be ended, and the only sure way of doing so is by holding those responsible accountable.

Political killings and assassinations are divided into two categories, those of prominent Kenyans, and those of ordinary wananchi who were deemed to be critical of, or opposed to, KANU over the last forty years. The Task Force recommends that a truth commission should investigate a number of these killings, including those of Pio Gama Pinto, J.M. Kariuki, Dr. Robert Ouko, and Father Anthony Kaiser. Among the most significant political assassination was that of the late J. M. Kariuki in 1975. The Task Force also recommends that the truth commission select a number of killings of ordinary wananchi for investigation.

Massacres and Possible Genocides

The use of political violence by the state to quash opposition to it was directed not only at individuals, but also at groups and communities. By far the most brutal massacres of Kenyans have been carried out in Northern Kenya, and in particular North Eastern Province, which has since the colonial time been the epicenter of human rights violations in Kenya. Since independence, KANU governments have treated Northern Kenya as enemy territory and its residents as second-class citizens. The region is an abject lesson in marginalisation and official neglect. It has been rendered so remote and inhospitable that its residents do not – and cannot – feel Kenyan. Frequent military expeditions, the brutality of the provincial and district administrations, massacres, the castration of males, the rape of women and girls, the dumping of toxic waste, and the complete lack of development have turned the area into a vast wasteland.

A truth commission must investigate all the massacres in the region, particularly the Wagalla Massacre in which thousands were brutally and callously exterminated by state security forces. The Wagalla Massacre may meet the criteria for genocide since it was directed at one community, the Degodia. Other massacres include the Bagalla Massacre, the Malka-Mari Massacre, and many others in the region. The truth commission must also investigate the Kisumu Massacre of 1969 in which scores were brutally murdered when President Kenyatta visited the area. That massacre came to symbolize the proclivity of KANU governments to repress citizens of the Luo community in Kenya.

Political Violence and Killings of Democracy Advocates

In the late 1980s until 2002, the Moi government pursued an open policy of using naked state violence to suppress and vanquish the political opposition and pro-democracy campaigners, among them civil society, opposition political parties, journalists, students, the clergy, and any and every real or imagined political dissident. Opposition political rallies and meetings of government critics were frequently broken up, and violently so. Police and security forces have killed scores of reformers throughout the last two decades. But perhaps the most memorable use of state violence against pro-democracy advocates was the Saba Saba incident of July 7, 1997 in which government agents killed more than a dozen Kenyans. A truth commission must investigate Saba Saba and other similar incidents.

Torture, Detention, Exile, Disappearances, Rape, and Persecution of Opponents

Over the last forty years, the state used its enormous power and resources to vanquish all those deemed its opponents. The torture of government critics became state policy. Hundreds, if not thousands, have been tortured and mistreated by the previous governments. Many were killed in the process, while others were maimed for life. Some were castrated. Women and girls were raped. The Nyayo House Torture Chambers, which the Task Force visited, and which the Minister for Justice and Constitutional Affairs has termed a national monument of shame, stands as the living testimony of the brutality of the state.

It was a dungeon where political opponents were stripped of their humanity and subjected to the cruelest of torture tactics. Many other state opponents were detained without trial or jailed on trumped up politically motivated charges. Some, like Mr. Kenneth Matiba, were ruined beyond repair by detention. Some were disappeared, while others, like the celebrated writer Professor

Ngugi wa Thiong'o, were forced into exile. The list goes on. A truth commission must investigate these abuses.

Politically Instigated Ethnic Clashes

Throughout the 1990s, the Moi government instigated and at times directed the ignition and execution of ethnic clashes against communities that were deemed to be in opposition to it. Directed at so-called opposition communities and zones, these clashes exploited the volatile question of land as their pretext. Communities that had lived peaceably together for decades were suddenly turned against each other as the KANU state sought to stamp out opposition to its rule. Various investigations and reports by the Law Society of Kenya, the churches, the Kiliku Report, the Akiwumi Report, and many others established beyond the shadow of a doubt that KANU, its senior officials, their allies, many of its members of parliament and local politicians, the police and security forces, and the provincial and district administrations either instigated or carried out attacks against individuals and communities deemed opponents of the regimes.

In both the Rift Valley and Coast Provinces, in particular, Kenyans from certain communities were termed "foreigners" and either killed outright, their lands forcibly taken, their property and livestock confiscated or destroyed, women and girls from their communities raped and beaten, and their lives irreparably ruined. Many of these "foreigners" were forcibly exiled from the provinces and dared to return. Thousands were killed and hundreds of thousands internally displaced in the so-called land clashes. Deep wounds have been left on the Kenyan psyche by these clashes. The epicenters of the clashes, such as Molo, Enosopukia, Likoni, and many other places must form a central component of the terms of reference of a truth commission, and must be fully investigated. The truth commission ought to establish culpability and make recommendations for redressing these most abominable of violations.

The truth commission, in its investigation of land and ethnic clashes, shall pay particular attention to historical claims and distortions brought about by colonialism. These historical problems were not addressed, and have in fact been compounded by post-colonial governments. Further, the Task Force recommends that the government expand the mandate of the recently appointed land commission to fully investigate and settle historical land problems with finality.

Violations of Economic, Social and Cultural Rights

Economic crimes are a difficult matter to investigate and establish culpability. Quite often, white-collar criminals are adept at covering their tracks and concealing the chain of evidence. Human rights violations or bodily integrity violations, on the other hand, are easier to verify and establish because human bodies are the primary evidence. That is why most truth commissions have found it difficult to address economic crimes. Even so, economic crimes are so intertwined with human rights violations that it is impossible to establish watertight compartments between the two types of violations. This is more so in the Kenyan case where economic crimes were committed as part and parcel of human rights violations.

Land, for example, is an economic asset, and the killing or forcible eviction of the lawful owners from their lands constitutes both economic crimes and human rights violations. Similarly, the looting of the public purse and the stealing of public monies in bank accounts at home or abroad has translated into a collapsed infrastructure and economic decomposition. Deaths on Kenya's horrible roads, the absence of medicines and hospital equipment, the pathetic state of Kenyan schools, and a host of other ills are directly attributable to the theft of public funds and property by previous governments over the last forty years.

Economic crimes lead to the violations of the entire gamut of human rights, and in particular of economic, social and cultural rights. It is a well-established fact in human rights law that all human rights – including economic, social and cultural rights – are indivisible, interdependent, and interrelated. Thus human rights law does not only refer to civil and political rights. The Republic of Kenya has an internationally binding obligation to protect all human rights, that is, civil and political rights, and economic, social and cultural rights because it is a signatory to both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. That is why a truth commission should investigate the violations of civil and political rights as well as those of economic, social and cultural rights. It is important to note that violations of economic, social and cultural rights disproportionately affect both women and children. These include the rights to shelter, education, water, work, health, and a host of others. Kenya is a patriarchal society in which women and children are the most vulnerable individuals, and on whom the violations of economic, social and cultural rights have the greatest impact. This is a matter to which the truth commission ought to pay special attention.

The Task Force realizes that a truth commission should not investigate the bulk of economic crimes because the Goldenberg Commission and other state offices are looking into them. In addition, economic crimes, due to their complexity, are very difficult to investigate. Yet, the Task Force believes that a truth commission should investigate a selected set of economic crimes that directly lead to the violations of economic, social and cultural rights. A few examples will suffice. The failure by a contractor for the production and provision of clean and safe drinking water because of fraud or theft of public funds resulting in ill health or deaths ought to be the subject of an investigation by a truth commission. The same should be true for the grabbing of public land to displace a school, a community cultural center, or other public amenities. A fraudulent contract for providing medical supplies could also be the subject of scrutiny. In other words, a truth commission should address a selected set of economic crimes that have a direct bearing on the enjoyment of economic, social and cultural rights.

It is the view of the Task Force that the truth commission ought to be given powers to negotiate with perpetrators of economic crimes for the return of public property, wealth, and monies in exchange for recommendations for a limited amnesty or immunity from prosecution. The truth commission should be empowered to establish a Victim's Compensation and Rehabilitation Fund from such property and funds.

Section 9. THE POWERS AND PRIVILEGES OF THE TRUTH COMMISSION

The Powers of the Truth Commission

Kenyans are clear that they want an independent and effective truth commission. Kenyans repeatedly reminded the Task Force in both their oral and written submissions that they are skeptical of government commissions. It is common knowledge that government commissions were established by previous regimes to hoodwink the people, to equivocate, and deceive the public that investigations would be undertaken and the rule of law upheld. Yet, in reality, many government commissions were either disbanded before completing their work or their reports were never made public or implemented. Most of the commissions were undermined through financial starvation, intimidation, or interference from the Executive and other high-ranking officials. In effect, Kenyans told the Task Force that government commissions have in the past been a charade and a waste of public resources. But Kenyans have faith that the Kibaki government will depart from the tradition of former regimes by respecting the intelligence of Kenyans.

It is in this context that Kenyans told the Task Force that a truth commission should not be a whitewash or an instrument for deceiving Kenyans and allowing past offenders to escape scot-free. Kenyans want a truth commission to be fully empowered, independent, and to conduct its affairs in daylight. They believe that only such a commission can bring out the whole truth, provide justice, and lead to national reconciliation and healing. The Task Force concurs with Kenyans on this critical question. It therefore recommends the following powers and privileges for a truth commission.

The Independence of the Truth Commission

The independence of a truth commission is key to its success and effectiveness. Although the Task Force has recommended that a truth commission be established by a presidential order, and not through an Act of parliament, a fact that may formally make it less independent, the Task Force believes this approach does not necessarily compromise its independence if there is political will and good faith on the part of the executive. In this respect, the President must, when establishing the truth commission, publicly commit to Kenyans that he will give the truth commission ample powers, that he will fully support it morally and with resources, and that he will not interfere with its work. Thus the executive must publicly commit to the financial and functional independence of the truth commission.

The commission must have the power to raise and receive funds, resources, and other forms of support from any source, both local and foreign. The President must declare that there are no sacred cows for the truth commission whether in his government or in previous regimes, and that he will allow the commission's investigations to lead wherever they might. In this connection, therefore, the truth commission must have the authority to run its own affairs, hire and constitute its own secretariat, write its own regulations, and conceptualize and execute its mandate pursuant to its terms of reference.

The Powers to Investigate Past Violations and Offenders

A central purpose of a truth commission is to establish a correct and truthful historical account of past abuses, identify the perpetrators, and the reasons for their actions. This purpose cannot be accomplished unless the truth commission is given adequate investigative powers, and receives proper cooperation from the executive, law enforcement agencies, and the judiciary. Thus the truth commission must have the powers to call witnesses and compel them to appear on pain of contempt; it must have access to all official records and documents that are relevant to its work; it must have the power to inquire, enter both official and private premises in search of evidence; and it must receive the full and complete cooperation of all government officials, departments, and institutions. In other words, the truth commission must expect that the state will facilitate its investigations and inquiries.

The Power to Make Recommendations

The truth commission is not a judicial body, although it enjoys a quasi-judicial status. Although a truth commission cannot issue judicial orders, it must have the power to make a wide range of recommendations. These include the power to recommend the prosecution of offenders; the power to recommend reparations, restitution, and compensation; the power to recommend that particular individuals be barred from public office, otherwise known as lustration; the power to negotiate with perpetrators for the return of stolen property and public funds in exchange for a limited amnesty and immunity from prosecution; the power to recommend that anyone who acts in contempt of the truth commission, commits perjury, or obstructs in any way the work of the truth commission, be subjected to severe judicial sanctions; the power to recommend that stolen property or public funds be returned either to their rightful owners or to the state to form part of the Victim's Compensation and Rehabilitation Fund (VCRF); the power to set up the VCRF; and the power to recommend corrective measures to prevent a recurrence of past abuses.

The Power of Transparency

Past presidential commissions have failed to act transparently. The truth commission must break this tradition. It must have the power to hold its hearings in public, and to determine when it should sit in camera; it must have the power to broadcast its sessions live on radio and television, and to be covered live by all media; it must have the power to make its report and findings public within a short time of its submission to the head of state; and it must have the power to name names and release any other information to the public that it deems fit. In this connection, the truth commission should have the power to freely carry out civic education and engage in any other public campaigns that would advance its work.

The Power to Recommend the Grant of Conditional Amnesty

The truth commission, in its wisdom, and in furtherance of its work, may recommend the grant of conditional amnesty to past offenders in exchange for full disclosure to particular questions.

The Power to Negotiate and to Receive Stolen Wealth, Property, or Funds

The truth commission should be empowered to negotiate with offenders for the return of stolen funds, wealth, or property in exchange for immunity or a conditional amnesty.

The Power to Promote Reconciliation, National Healing and Unity

The truth commission should be empowered to promote reconciliation, national healing, and unity through mediation, civic education, and other public campaigns.

The Privileges of the Truth Commission

The truth commission and its commissioners should be shielded from both criminal and civil liability in the execution of their duties. In particular, the truth commission and its commissioners, as well as the staff, should enjoy immunity from defamation and libel suits with respect to their work. Such immunity shall extend to all the witnesses and all those who appear before the truth commission.

Section 10. HISTORICAL PERIOD TO BE COVERED BY THE TRUTH COMMISSION

The historical period to be covered by a truth commission is usually a matter of great national debate. Kenya has not been an exception. This is particularly the case because since the founding of Kenya as a state in 1895 by the British, the country has been defined by gross atrocities and its lack of basic freedoms. Theoretically, it can be argued that Kenya's abominations are directly linked to its creation and the distortions that were effected in the colonial period. The land problems in many parts of the country owe their origins to colonial policies. Some of the ethnic problems are traceable to that period. Some Kenyans in the Rift Valley, North Eastern, Coast, and even Central provinces voiced this view. But the choice of the historical period to be addressed by a truth commission must be informed by many factors. Colonial atrocities and the distortions of the era should not therefore be the determinant factor, important though that era is.

But the Task Force is cognizant of the importance of the pain and anguish that Kenyans still suffer because of the legacy of colonialism. Colonial land alienation and the dispossession of some citizens in the Rift Valley and in areas historically occupied by the Maasai, for example, are vivid examples. The Task Force heard first hand the wrongs committed against peoples in the region by the British. The same is true of Central Province and parts of Eastern province. The Mau Mau war of liberation was a quest for both liberty and the repossession of lands from which Africans were alienated in these provinces. The atrocities by the British in Northern Kenya, and North Eastern Province in particular, left indelible marks in the region and consigned it to the backwaters of Kenya. The colonial atrocities in the Coast Province through multiple invasions by atrocious powers can never be forgotten. But the Task Force believes that serious as the human rights violations of the colonial era were, they ought not to be addressed by a truth commission. The reasons are simple and straight-forward.

First, that period is too remote in time, and the questions that it raises are too complex for a transitional justice instrument like a truth commission. Evidence would be scant; many of the perpetrators are long dead or in the United Kingdom. Secondly, the answerable power is not Kenya but the United Kingdom, and truth commissions are not generally established to investigate a remote, departed power. Finally, extending the truth commission to the colonial period would be an impossibly expensive, laboriously prohibitive, and practically unmanageable exercise. For these reasons, the Task Force rejects 1895 as an impracticable time-line, and instead recommends that the Kenya government sets up a less ambitious vehicle, such as a committee of eminent Kenyans to examine a limited set of issues relating to the colonial period.

The Task Force suggests that such a committee could address the atrocities committed against freedom fighters in different parts of the country. The purpose here would be to seek redress from the British and recognize those who fell in the struggle to defend and liberate Kenya.

The Task Force therefore is of the view that a truth commission ought to cover the period from 1963 to 2002, the post colonial era and the period KANU ruled the country. But the Task Force heard and rejected some minority views that the truth commission only addresses either the politically instigated so-called ethnic clashes of the 1990s or the Moi Presidency from 1978 to 2002. The majority of Kenyans want a truth commission to address the post-colonial period from 1963 to 2002.

The reasons for this choice, which the Task Force endorses, are rational, compelling, and unassailable. First, the period combines the first and the second regimes under KANU, and as such cannot be said to be selective or directed at any particular community. This is important because a truth commission cannot be legitimate if it appears to be an instrument to settle scores against a particular former regime, community or individuals. Secondly, the post-colonial period is very present, and not remote. Many of those who served in the independence government are still alive. Thirdly, it stands to reason that Kenyans ought to rightly audit their own state, not the colonial British state. Fourth, the human rights violations and gross economic crimes that the majority of Kenyans want investigated were committed over the last forty years. Lastly, the investigation span of the last forty years is financially feasible and defensible, practical, and could be carried out within a two-year period. It is for these reasons that the Task Force recommends that a truth commission cover the period from December 12, 1963 to December 31, 2002.

CONCLUSIONS

The Task Force therefore concludes that the government should establish an independent and effective truth commission. It should be established by the President through the Commission of Inquiry Act, Chapter 102 of the Laws of Kenya, and enjoy all the powers appertaining thereto. It should have the power to investigate human rights violations such as political assassinations and killings, so-called ethnic clashes, political violence by the state against opponents, detention, torture, and harassment, massacres, the violations of the rights of women, including rape and sexual abuse, and economic crimes that directly lead to the violations of economic, social and cultural rights, among others. The Task Force should have the power to make recommendations

on lustration, redress, and other victim-centered measures. It should also promote national healing and reconciliation. Finally, the truth commission should investigate abuses committed between 1963 and 2002.

CHAPTER 4. RECOMMENDATION

Section 11. THE TRUTH, JUSTICE AND RECONCILIATION COMMISSION

The Task Force was mandated to recommend to the Government the following institutional architecture of a truth commission. The Task Force has therefore drafted, in the form of a presidential commission, this comprehensive institutional framework. It provides the powers, structures, composition, terms of reference, mandate, and the historical period to be covered by a truth commission.

A commission to be known as the Truth, Justice, and Reconciliation Commission to inquire into human rights violations in Kenya between 12th December 1963 and 31st December, 2002 by the State, its organs and public officers with a view to seeking and promoting justice, national unity, and reconciliation among the people of Kenya by recommending appropriate redress for persons who have suffered any injury, hurt, damage, grievance or those who have in any other manner been adversely affected through such acts and omissions as further specified in this commission.

Now, therefore, in exercise of the powers conferred upon the President by Section 3 of the Commission of inquiry Act, I, Mwai Kibaki, President and Commander-in Chief of the Armed Forces of the Republic of Kenya, do direct the commissioners to hold an inquiry at Nairobi and such other places within the Republic of Kenya with effect from 1st June, 2004 and conclude the inquiry on or before 30th June, 2006.

The objectives of this Commission shall be:

- 1) To seek and promote justice, national unity, healing, and reconciliation among the people of Kenya –
 - a) By establishing accurate, complete and historical record of violations and abuses of human rights and economic rights inflicted on persons by public institutions and holders of public office between 12th December 1963 and 31st December 2002;
 - b) Establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights and economic rights which were committed during the period from 12th December 1963 and 31st December 2002, including the antecedents, circumstances, factors and context of such violations, as well as the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations, by conducting investigations and holding hearings;
 - c) Facilitating the prosecution of perpetrators of gross human rights violations that were committed between 12th December 1963 and 31st December 2002;
 - d) Determining ways, means of redress for victims of gross human rights violations;
 - e) Facilitating the granting of conditional amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with gross human rights violations and economic crimes and comply with the requirements of this Act;

- f) Providing victims, perpetrators, and the general public with a platform for non-retributive truth telling that charts a new moral vision and seeks to create for all Kenyans a value-based society;
 - g) Establishing and making known the fate or whereabouts of victims and by restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims, and by recommending reparation measures in respect of them;
 - i) Compiling a report providing as comprehensive an account as possible of the activities and findings of the Commission contemplated in paragraphs a), b) and f), and which contains recommendations of measures to prevent the future violations of human rights and economic rights;
 - h) Providing victims of human rights abuses and corruption with a forum to be heard and restore their dignity;
 - j) Providing repentant perpetrators or participants in atrocities with a forum to come clean on their actions as a way of bringing reconciliation.
- 2) The provisions of clause (1) above shall not be interpreted as limiting the power of the commission to investigate or make recommendations concerning any matter with a view to promoting or achieving justice, national unity and reconciliation within the context of this Commission and the said Act.
- 3) In order to achieve the objectives of the Commission the commissioners shall constitute:
- a) The Committee on Justice and Human Rights Violations, to deal, among other things, with matters pertaining to investigations of gross violations of human rights;
 - b) The Committee on Amnesty, Reparations and Rehabilitation, to deal with matters referred to it relating to reparations and amnesties;
 - c) An investigating unit to perform the investigations required under this Commission;
 - d) Subcommittees to exercise, perform and carry out the powers, functions and duties conferred upon, assigned to or imposed upon them by the Commission.

The terms of reference for the Commission shall be:

- a) Investigate violations abuses and of human rights relating to killings, abductions, disappearances, detentions, torture, ill-treatment and seizure of properties suffered by any person within the specified periods;
- b) Investigate the context in which and the causes and circumstances under which the violations and abuses occurred and identify the individuals, public institutions, bodies, organizations, public office holders or persons purporting to have acted on behalf of any public body responsible for or involved in the violations and abuses;
- c) Identify and specify the victims of the violations and abuses and make appropriate recommendations for redress;
- d) Investigate and determine whether or not the violations and abuses were deliberately planned and executed by the state or any person referred to in paragraph (b);

- e) Conduct investigations relevant to its work and or seek the assistance of the police and any public or private institution, body or person for the purpose of an investigation;
- f) Investigate any other matters that it considers requires investigation in order to promote and achieve national reconciliation;
- g) Identify and specify persons who should be prosecuted for being responsible for or involved in human rights and economic rights violations and abuses;
- h) Investigate violations of economic rights;
- i) Investigate and provide redress in respect of crimes of a sexual nature against female victims that were committed with political ends;
- j) Educate the public and give sufficient publicity to its work so as to encourage the public to contribute positively to the achievement of the object of the Commission.
- k) Make recommendations to the President with regard to –
 - i) The policy that should be followed or measures that should be taken with regard to the granting of reparation to victims or the taking of other measures aimed at rehabilitating and restoring the human and civil dignity of victims;
 - ii) Measures that should be taken to grant urgent interim reparation to victims.
- l) Make recommendations to the Attorney General with regard to prosecution of persons responsible for or involved in human rights and economic rights violations and abuses.
- m) Make recommendations to the President with regard to the creation of institutions conducive to a stable and fair society and the institutional, administrative and legislative measures that should be taken or introduced in order to prevent the commission of violations of human rights.

And in accordance with Section 7(1) of the said Act, to report thereon as soon as reasonably practicable but not later than 30th September 2006.

And I do direct that the said Commission shall consist of 11 commissioners appointed from amongst Kenyans of integrity, sense of fairness and ability to achieve the objectives specified in this commission and provided that:

- a) One third of commissioners shall be women;
- b) No more than three commissioners shall be religious leaders;
- c) No more than three commissioners shall be lawyers;
- d) At least one person of disability is appointed as commissioner;
- e) The commissioners shall reflect the geographical and other diversity of Kenyan Society.

And I do direct the commissioners to appoint in their service a person as the chief executive officer of the Commission who shall be in charge of administrative staff required to carry out such duties and perform such functions as they may from time to time impose upon him or her in order to achieve the objectives of the Commission.

And I do direct that in order to achieve the objectives of the commission and to perform its task the Commission shall exercise such powers as provided for and incidental to this Act and without prejudice to the generality of the foregoing the Commission shall have the power to:

- a) Determine the seat, if any, of every committee;
- b) Establish such offices as it may deem necessary for the performance of its functions;
- c) Establish subcommittees to exercise, carry out or perform any of the powers, duties and functions assigned to them by the Commission;
- d) Conduct any investigation or hold any hearing it may deem necessary and establish an investigating unit;
- e) Refer specific or general matters to, give guidance and instructions to, or review the decisions of, any committee or subcommittee or the investigating unit with regard to the exercise of its powers, the performance of its functions and the carrying out of its duties, the working procedures which should be followed and the divisions which should be set up by any committee in order to deal effectively with the work of the committee;
- f) Direct any committee to make information that it has in its possession available to any other committee or subcommittee;
- g) Direct the submission of and receive reports or interim reports from any committee or subcommittee;
- h) Have the administrative and incidental work connected with the exercise of its powers, the execution of its duties or the performance of its functions carried out by persons –
 - i) Employed or appointed by it;
 - ii) Seconded to its service by any department of State at the request of the Commission and after consultation with the Public Service Commission;
 - iii) Appointed by it for the performance of specified tasks.
- i) Receive grants and donations from any other source;
- j) In consultation with the Minister and through diplomatic channels, obtain permission from the relevant authority of a foreign country to receive evidence or gather information in that country;
- k) Enter into an agreement with any person, including any department of State, in terms of which the Commission will be authorized to make use of any of the facilities, equipment or personnel belonging to or under the control or in the employment of such person or department;
- l) Recommend to the President that steps be taken to obtain an order declaring a person to be dead;
- m) Hold meetings at any place within or outside the Republic;
- n) On its own initiative or at the request of any interested person inquire or investigate into any matter, including the disappearance of any person or group of persons.

And I do direct that, in the performance of its task, the Commission shall receive views from members of the public and receive oral and/or written statements from any person with relevant information, and may:

- a) Make use of official reports of any investigations into abuses and violations of human and economic rights;

- b) Use any investigation report by any institution, organization or individuals into abuses and violations of human and economic rights;
- c) Commission reports from experts in any relevant areas.

And I do direct that the Commission may co-opt not more than seven (7) persons who in view of the Commission, could facilitate effective execution of its functions on a specific issue spelt out in the terms of reference.

And I do direct that in accordance with the provisions of section 10(1) of the said Act, the commissioners shall summon any person or persons concerned to testify on oath and to produce any books, plans and documents that the commissioners may require. And without prejudice to the generality of the foregoing the commission for purpose of the conduct of its proceedings, shall have power:

- a) To require any person to disclose truthfully, any information within the knowledge of that person and which is relevant to the proceedings;
- b) To examine any witness on oath or affirmation and to administer the oath or affirmation;
- c) To issue subpoenas requiring the attendance of a person before the Commission and require the production of any article, documents or other record relevant to the proceedings;
- d) To cause any person who refuses to comply with an order or directives of the Commission or acts in any manner contemptuous of the Commission to be charged with contempt of court and for that person to be tried at the High Court; and
- e) To require a person to fill a form providing such information and within such period as shall be specified in the form.

And I do direct that after its commencement, the said inquiry may be held at such times and in such places as the commissioners may, from time to time, determine and shall be held in public or in private as the said commissioners may, from time to time, determine.

And I do direct that the said commissioners shall execute the said inquiry with all diligence and speed and make their report which shall comprise the findings and recommendations of the Commission and shall among other things:

- a) Provide proper documentation and establish the nature and causes of the serious violations and abuses of the human and economic rights of persons;
- b) Provide accurate records of matters investigated by the Commission;
- c) Name individuals responsible for or involved in human and economic rights violations: Provided that no person shall be so named unless he has
 - i) been informed without delay of the allegations against him or her and of the intention to name them in a public report, and
 - ii) been given the opportunity to respond to the evidence against him or her and offer a defence either in writing or through oral hearing;

- d) Recommend the appropriate response to the specific needs of each victim or group of victims;
- e) Suggest measures to prevent and avoid the repetition of such violations and abuses;
- f) Recommend reforms and other measures whether legal, political, administrative or otherwise needed to achieve the objectives of the Commission;
- g) How to promote healing and reconciliation; and
- h) The setting up of a reparation and rehabilitation fund.

And I direct the said commissioners to make its report public within 30 days after submitting it as provided for by this Commission.

And I do direct that in accordance with the provisions of Section 19 of the said Act, the Minister for Justice and Constitutional Affairs shall make regulations:

- a) Prescribing anything required to be prescribed for the proper application of the said Act; and in particular, this commission;
- b) Prescribing the remuneration and allowances and other benefits, if any, of Commissioners: Provided that such remuneration shall not be less than that of a Judge of the High Court of Kenya;
- c) Determining the persons who shall for the purposes of this Act be regarded as the dependants or relatives of victims;
- d) Providing, in the case of interim measures for urgent reparation payable over a period of time, for the revision, and, in appropriate cases, for the discontinuance or reduction of any reparation so paid;
- e) Prohibiting the cession, attachment or assignment of any such reparation so granted; determining that any such reparation received in terms of a recommendation shall not form part of the estate of the recipient, should such estate be sequestrated;
- f) Providing for the payment or reimbursement of expenses incurred in respect of travel and accommodation by persons attending any hearing of the Commission in compliance with a summon issued in terms of this Act;
- g) With regard to any matter that the President deems necessary or expedient to prescribe in order to achieve the objects of this Act.

And I further do direct that:

1. a) The funds of the Commission shall be derived from such sums as may, from time to time, be appropriated by Parliament for that purpose;
- b) The Commission may receive grants and donations from any other source: Provided that such grants and donations shall not be made or received for purposes of influencing the decision or ability of the Commission in any way and shall be disclosed in the annual report of the Commission;
- c) There shall be paid out of the funds of the Commission, all expenditure incurred by the Commission in the exercise of its powers or the performance of its functions under this Act.

2. The Commission shall open and maintain such bank accounts as are necessary for the performance of its functions.
3. The Commission may:
4. a) Invest any of its surplus funds in Government securities;
b) Place on deposit with such banks as it may determine, any moneys not immediately required for the purposes of the Commission.
4. The financial year of the Commission shall be the period of twelve months ending on the thirtieth June in each year.
5. a) At least three months before the commencement of each financial year, the Commission shall cause to be prepared estimates of the revenue and expenditure of the Commission for that year;
b) The annual estimates shall make provision for all the estimated expenditure of the Commission for the financial year and in particular, the estimates shall provide for –
 - i) The payment of salaries, allowances and other charges in respect of the staff of the Commission;
 - ii) The proper maintenance of the buildings and grounds of the Commission;
 - iii) The maintenance, repair and replacement of the equipment and other property of the Commission.
c) The annual estimates shall be approved by the Commission before the commencement of the financial year to which they relate and shall be submitted to the Minister for approval and after the Minister's approval, the Commission shall not increase the annual estimates without the consent of the Minister.
6. a) The Commission shall cause to be kept proper books and records of account of the income, expenditure and assets of the Commission.
b) Within a period of four months from the end of each financial year, the Commission shall submit to the Controller and Auditor-General, the accounts of the Commission together with –
 - i) A statement of the income and expenditure of the commission during that year; and
 - ii) A statement of the assets and liabilities of the Commission on the last day of the year.
c) Notwithstanding the provisions of any other written law for the time being in force, the accounts of the Commission shall be audited by the Controller and Auditor-General.

And I do command all other persons whom it may concern to take due notice hereof and to give their obedience accordingly.

Dated and signed by the President of the Republic of Kenya.

ANNEXTURES

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ANNEX 1. WRITTEN SUBMISSIONS, INDIVIDUAL AND GROUP CONSULTATIONS

The Task Force received 38 written submissions. These submissions were as a result of individual and group consultations, the substance of which is summarised below.

To set up or not to set up a commission

Out of **38** submissions received, **25** addressed the terms of reference of the task force of which only **one** was against the establishment of a commission.

Two submissions opposed the reconciliation aspect of the proposed commission. **One** person said that it should be a “National Reconciliation Commission” since the truth “is known”. The submission considered justice to be a problematic area and that the commission may not accomplish much.

Other views expressed optimism that the commission will be important in ending the culture of impunity and lack of accountability; that the commission should not be used to waste time; it must not be used as a witch-hunt or to settle political scores; it should fairly and expeditiously dispense justice to victims of past abuses.

How and when the commission should be established

How

The commission should be independent in law, in fact and in practice.

Three people out of the 25 who addressed the terms of reference expressly stated how they would like the commission set up. One person said that the commission should be anchored in the new constitution and therefore the enactment of the new constitution is crucial to the establishment of this commission. One person said we should borrow from the South Africans. One person said that the commission should be set up by an Act of parliament.

When

The commission should be set up soon after the task force submits its report. Most speakers expressly stated when they would want the commission be set up.

Life of the commission

Four people expressly stated how long they would like the commission to work. One person said that the commission should not take a lot of time as an already enormous amount of evidence exists. To save the country time and money, the commission should make use of this information. Two people said that the commission should work for one or two years. Another said the commission should work for one year and three months.

Terms of reference

Various submissions proposed that the commission should look into the following:

- Slavery and slave trade
- The dispossession of land going back to the Sultan of Zanzibar, the British and post-independence governments
- Detention without trial
- Torture
- Land clashes
- The 1982 attempted coup
- Economic crimes like Goldenberg
- Institutional responsibility and complicity in the violation of human rights
- Economic sabotage e.g. of coffee farmers and private companies by the KANU elite like Uchumi Insurance Brokers
- Political assassinations
- Land grabbing
- Corruption
- Mwakenya
- Insecurity and banditry in Pokot, Turkana and North Eastern Province
- Massacres (Wagalla, the Kisumu Killings etc)

The commission should also investigate:

- Inheritance and property rights violations particularly those of women, widows and children
- The root causes and reasons for past abuses and recommend steps to prevent their recurrence
- Reproductive health rights
- Aids and rape of young girls and boys
- Retrenchment and plight of street families
- Expulsion of students from public universities

The commission should, in addition to investigations, do the following:

- Rewrite the history of Kenya. The commission should be truthful to this history and correct the distortion of historical facts that has happened over the years.
- Recommend ways and means of promoting reconciliation over major issues dividing Kenya including ethnicity.
- Promote dialogue which is the basis of genuine peace making
- Initiate the healing of the nation by talking, compensating victims, forgiving. Perpetrators should apologize to victims of past abuses.
- Provide victims with a forum to be heard in a dignified manner
- Provide perpetrators with a forum to come clean

One person urged that the scope of the commission be limited because an all-too-comprehensive commission would be expensive, time consuming and delay justice. The Truth Commission should address psychological as well as spiritual needs rather than promise material benefits such as compensation.

Powers and Privileges

The commission should have the power to:

- prosecute and convict perpetrators
- recommend reparations, reward, compensate or restitute, and provide support to families of victims
- restore property to its original owners and order the reinstatement of stolen public property
- recommend the sacking of corrupt public officials and bar perpetrators from holding public office
- recommend ways of reforming existing institutions to prevent recurrence of past atrocities
- grant amnesty to remorseful perpetrators who disclose their roles in past abuses or who return stolen property

The commission should have the following privileges:

- access to all information it needs and to protect sources of such information
- act on its own recommendations
- recommend who should implement what recommendations

Specific recommendations were made on **reparations** as key to the work of the commission. Reparations are not only monetary; they should take other forms such as holidays, medical care for victims and free education for the children of victims. It was submitted that reparations are an obligation of the state and it should establish a **Reparations Fund** to which even perpetrators can contribute.

Victim support and empowerment was also proposed as well as psychological support for victims, commissioners, the media and others who would for long periods be exposed to victim testimonies.

Membership of the commission

The main criteria for selecting members should be high moral integrity, qualification and experience with proven track record. Members should be politically non-partisan. The commission should also be broad-based and represent the face of Kenya. Members should be religious leaders, representatives of human rights groups, civil society, the LSK, the judiciary and Kenyans in the diaspora.

It was proposed that lawyers should not dominate the commission because the issues to be addressed are broad, which should be reflected in its composition. It was proposed that the commission comprise 11 members five of whom must be distinguished lawyers with experience in human rights law and practice while another person proposed 80 eminent Kenyans i.e. ten commissioners per province.

A strong secretariat with an experienced secretary backed by others with skills in leadership, management and knowledge of the issues of transitional justice was also proposed.

Historical period to be investigated

Various suggestions were made ranging from 1950 to date. It was proposed that the work be done in four phases: 1952-1963, 1963-1978 and 1978-2002.

It was also suggested that the historical period be determined by the crime in question. Hence, the cut off date for political assassinations should be 1963; Corruption and misappropriation of public funds should be Moi's era – i.e. 1978; land clashes 1990.

List of written submissions:

1. Dr. Frank Njenga
2. Anonymous
3. Chemi Chemi ya Ukweli
4. Samuel Gitonga Muchemi
5. Fr. Eddie Karhof, Religious Superiors Conference of Kenya (RSCK)
6. Abel Mainda e-mail: taratibu2002@yahoo.com)
7. Agina Israel (agina@kenyaweb.com)
8. B. K. Mathenge, Uchumi Insurance Brokers Ltd.
9. Hassan Bashir Hassan Gele
10. Peter Maingi (fitacts@freight-in-time.com)
11. Wambui Otieno
12. Daniel Ishmael Ayieko Olilo
13. Samuel M. Magua
14. Kathendu Masya
15. Community Peace Museums Heritage
16. Supreme Council of Kenya Muslims
17. Citizens for Justice
18. Widows and Orphans Welfare Society of Kenya
19. Hon Oloo Aringo
20. Mr. Lucas Mboya
21. Centre for Non-Violent Change
22. A.H. Mchela Mbalaka
23. Mwatikho National Rehabilitation Centre for Victims of Torture
24. Paul Mwaura Mungai
25. The Shauri Moyo Ex-Pangani Residents Society
26. Joash Ogweni Amuom
27. Dr. Walter Edward Osewe Omocho
28. Maina Kiai
29. Juma Wycliffe OKodi Alakala Agencies
30. Pamellah Amadi
31. Ndiu-ini Murathimi's Clan
32. Paul Mwaura Mungai
33. Ndeuri Ng'ang'a
34. F.J. Kamande
35. Rashmin P. Chitnis, Hindu Council of Kenya
36. Nicholas Ondiro Midiwo
37. Family Advancement in Development Affairs
38. Towett Kamaiyo Joseph, Ogiek Welfare Council
39. Shiraz Durrani (shiraz.durrani@blueyonder.co.uk)
40. Humphrey Muthoga
41. National Council of Churches of Kenya
42. The Ecumenical Centre for Justice and Peace
43. Presbyterian Church of East Africa

- 44. The Consortium of Former Expelled and Suspended Students (COFESS- Kenya)
- 45. Wednesday Morning Prayer Group
- 46. Archer's Post Wamba and Isiolo Women (Petition to British Government)
- 47. Dol Dol Women British (Petition to British Government)
- 48. Archer's Post Women (Petition to British Government)

ANNEX 2. PROVINCIAL PUBLIC HEARINGS

2.1 NAIROBI PROVINCE

The Task Force conducted a public hearing in Nairobi Province on 10 June, 2003..

Task Force members attending:

Prof. Makau Mutua – Chairperson
Dr. (Rev.) Timothy Njoya – Vice-chairperson
Rev. Patrick Rukenya - Member
Ms. Jane Kiragu – Member
Mr. Julius ole Sunkuli
Dr. Josephine Ojiambo
Ms. Zarina Patel
Ms. Mumina Konso
Sheikh Ali Shee
Dr. Amukowa Anangwe
Rev. Mutava Musyimi
Ms. Rachel Omamo
Mr. Johh Githongo
Mr. Tirop Kitur
Prof. Zablon Nthamburi
Mr. Kibe Mungai
Ms. Roselyne Lagat-Korir

Secretariat:

Mr. Johnson Weru
Mr. Wanza Kioko
Mr. Albert Tulie

OVERVIEW

Apart from the public hearings at KICC, the task force also visited the former Nyayo House detention cells, Mathare 4A and Kamiti Maximum Security Prison on 11 June to appraise itself of the gravity of past human rights abuses (see reports of visits below).

The Task Force received submissions from 39 members of the public at KICC, Kamiti Maximum Security Prison and Mathare 4A.

FINDINGS

To set up or not to set up a commission

The majority of those who made submissions wanted the government to establish a Truth, Justice and Reconciliation Commission to look into past injustices. Concern was expressed that the government was keener on dealing with economic crimes than violations of human rights. Some speakers said the government should have set up the commission straight away like it did with the commission of inquiry into the Goldenberg affair instead of establishing a task force.

Thirty-one people out of 39 wanted a commission set up. **Thirteen** out of the 31 wanted a commission set up but did not support the idea of reconciliation. They argued that the government has no business asking people to reconcile. The victims should be able to decide whether to reconcile with their abusers or not. They said that reconciliation should be an outcome of a truth and justice process just as would be compensation and reconciliation.

Five out of the 39 people who appeared before the task force were vehemently opposed to the formation of such a commission.

Three people voiced conditional support for the establishment of a Truth, Justice and Reconciliation Commission. One wanted the government to hold a referendum on the matter to determine if Kenyans support the establishment of such a commission. Another felt that the political environment was not conducive for the establishment of such a commission. The government should make the environment conducive by, first, ridding itself of key functionaries of the former regime and, secondly, implementing thoroughgoing institutional reform. The third person urged the government to first explore the possibility of using other state organs like the courts to achieve the intended results of the commission before setting up the commission.

Two people wanted special genocide courts established to deal with past injustices if the ordinary courts cannot cope. If the government cannot use domestic courts, then attempts should be made to take these cases before international fora.

One person says that the commission should not address economic crimes. These should be left to other organs of the state.

One person out of the 39 was opposed to the justice component of the commission's work because, in his view, it is impossible to achieve justice for the many people wronged by the previous governments because everybody will want justice and the country will be overwhelmed.

Those **against** the establishment of the commission see the commission as intended to hoodwink Kenyans into believing that the government is taking action against those that have taken the nation down the path of destruction when indeed the government is doing nothing. They demanded that the government should act on existing intelligence on past injustices. The government should prosecute those that broke the law. Others felt that it would be an instrument to witch-hunt and persecute certain communities.

How and when the commission should be constituted

How

The commission should be anchored in the constitution and its mandate, powers and privileges should be set out in an Act of Parliament. The constitutive law of the commission should ensure its independence and effectiveness.

Seven people expressly stated how they would like the commission established. **Six** of them said that it should be set up by an Act of Parliament while **one** person suggested that it should be a presidential commission that will eventually report to the president.

When

The commission should be set up as soon as it is practically possible after the task force has submitted its report. Most people who made submissions in support of its establishment consider the proposed commission's work as an urgent national assignment that cannot be delayed any further.

Seven people submitted on when the commission should be set up. One person said that it should be set up "as a matter of urgency." Two persons said in six months. Two persons said that the commission should be set up by January next year. One person said the commission should be set up not later than three months after the task force submits its report. All these sentiments have one ring to them: urgency.

Terms of reference for the commission

The commission should address:

- Gross human rights violations - Torture, political killings (assassinations) police brutality and killings, massacres, detention without trial
- Economic crimes like corruption
- Grave injustices related to land such as land clashes and grabbing
- Institutional Culpability/responsibility of institutions and organs of state central to repressing them, e.g. judiciary, the police and the intelligence service.
- Activities of private militia like *Jeshi la Mzee* and connected political violence
- The repression, expulsion or murder of student political activists from Kenya's public universities.

In addition to the above, specific recommendations were made on the following:

- *Freedom fighters*: the government should establish a heroes' corner/acre.
- *Exiles*: The government should also facilitate the return of all exiles.
- *Scope*: The investigation should not be limited to state actors only. It should also be extended to non-state actors who might have acted in their private capacities and ordinary Kenyans who violated others.

Historical period to be investigated

The commission should investigate and address atrocities from 1963. Although the commission would be effective if it limited its work to the post-independence period, it must be informed by the experiences of the Kenyan people during the colonial period stretching back to 1895.

Eight out of the Nairobi 39 people expressly stated 1963 as the cut off date for investigating past injustices.

Five persons wanted the commission to investigate from 1895 and **one** person wanted the commission to start investigating from 1939.

The period of investigation can also be deduced from the terms of reference that the public gave the commission. One has to therefore look at the acts or injustices that most Kenyans want investigated. They fall within a certain period of Kenya's history and it is therefore reasonable to say that those Kenyans who say that the deaths of Tom Mboya and J.M Kariuki be investigated, implying that the whole independence era be investigated.

Powers and privileges of the commission

The commission should have the power to access information held by the government. It should be able to summon anyone, including the head of state, to testify or release required information; to compel persons to appear before it; to protect witnesses that appear before it and, allow for naming of persons implicated in any wrongdoing.

The commission should also have power to take action where appropriate. It should be able to recommend to government organs appropriate remedial action to right past injustices; power to recommend to the judicial system matters that require criminal prosecution.

The commission should have immunity against libel action against itself, its members, and persons who testify before it.

The commission should therefore have powers to:

- hear testimony from victims
- to receive and examine public records
- recommend rehabilitation measures for victims
- to compel people to appear before it
- To name names
- to protect witnesses and sources of information
- recommend compensation, restitution and reparations
- to prosecute
- to recommend prosecution to the judiciary
- to act on the reports of previous commissions
- reconcile and heal communities

Membership of the commission

High moral integrity and inclusiveness are the two major criteria for membership of the commission.

The commissioners should be men and women of high moral integrity, patriots, competent, people of good faith and representative of the face of Kenya. The commission should be lean but broad-based.

The commission should be gender balanced, reflect regional balance and the face of Kenya. It should comprise men and women, religious leaders, trade unionists, academics, lawyers, political scientists and youth. Representatives of international human rights defenders like Amnesty International should be ex-official members of the commission.

One person said that lawyers should not be members of the commission. **Another** person said that the commissioners should not have served in any of Kenya's governments – colonial or post-colonial

governments, while another said that they should not have served in any other commission. One person recommended that the number of commissioners should not exceed 19.

One person suggested that the public, and not the minister, choose the commissioners. It was also submitted that the judiciary (Bench), military and the police should not have representation in the commission since they bear institutional responsibility for violating the rights of Kenyans.

The life of the commission

The life of the commission should be long enough to carry out its mandate effectively. The time set must take care of the public concerns about its cost to the government and the history of past commissions that did not deliver. Most submissions wanted the commission given the shortest possible period to carry out the work to save the public money, time for other critical projects and avoid further delay in ensuring justice for the victims of past injustices. Many speakers wanted the commission to start work soon (expressed as “now”) so that the commission would finish its work in good time.

One person in Nairobi said immediately after the task force submits its report on 31 August. **Another** wanted the commission set up in January 2004. **Two** people said that instead of setting up the task force, the ministry should have set up the commission because it was eating into precious time.

Those who were outrightly opposed to the establishment of the commission mainly argued that the commission would be used to deny justice to long-suffering victims. It could also delay justice in cases where urgent action is necessary and possible. It means that if the commission is to have legitimacy, it must be set up soon and wind up its work expeditiously.

Others said that commissions are expensive and therefore unnecessary. If the commission is set up, Kenyans want the life of the commission to be determined by the need to save the country much needed resources for national reconstruction.

One person suggested that the commission, if it is formed, should sit for less than six months while two people said that it should take six to eight months. **Two** people proposed that it should sit for one year while one person said it should sit for **five** years.

SPECIAL SITE VISITS

Nyayo House “Torture Chambers”

Task force members visited the Nyayo House torture chambers as a site symbolic of gross violations of human rights by the state. The visit was to establish whether Nyayo House “torture chambers” were designed as part of an official state policy on the use of torture as an instrument of political repression.

Guides provided by the PC, who had prepared the rooms for the visit, showed the task force members around the basement. Some victims of torture at the Nyayo House torture chambers were also present.

Nyayo House was built in 1983 and has 12 torture chambers, six each on the right and left side. The cells were designed as “strong rooms” with very poor ventilation. Some of the rooms are painted red.

The victims described their ordeal in the cells and asked the task force members to seek explanation from the government and the architects as to the purpose for which the underground chambers were intended.

The task force members heard from former detainees present that people died in the cells of pneumonia and torture while some would be thrown out to the street and reported as having committed suicide. Former victims wanted the country to remember the alarming number of persons who committed suicide from the higher floors of the Nyayo house in the 80s, especially in 1986, and others who just “disappeared”.

Kamiti Maximum Security Prison

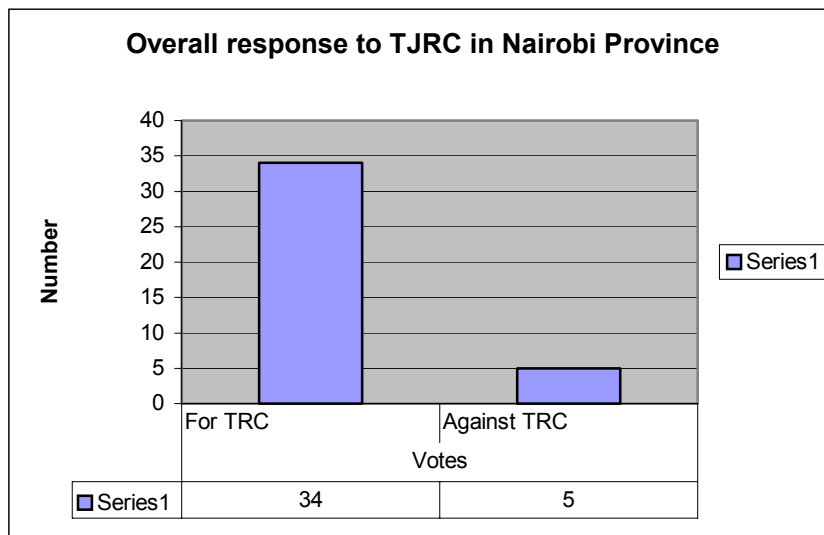
The task force members visited Kamiti because it is symbolic of the role the criminal justice system played in repressing citizens. Task force members were able to visit cells that held former political detainees.

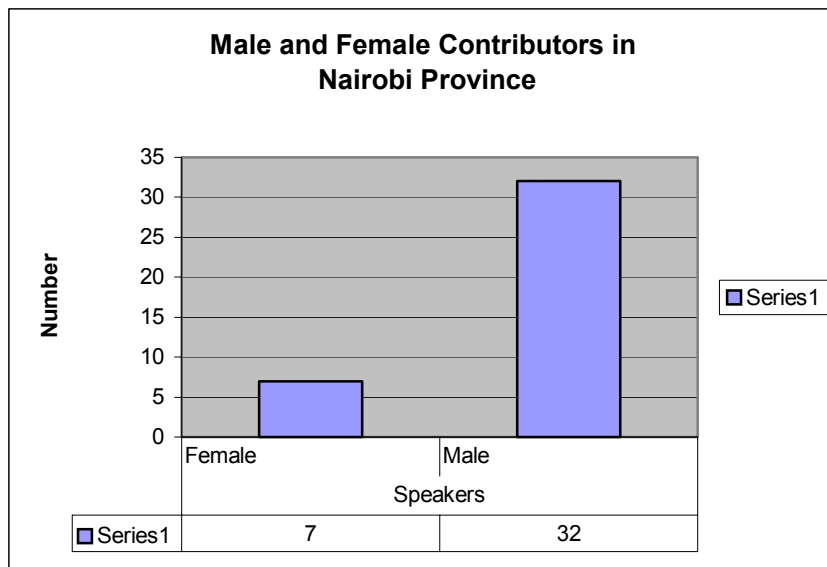
The task force members also wanted to see the hangman’s noose but it was not possible. There has been no hangman since 1987. It was also not possible to see Kimathi’s grave. Prison authorities were not sure if Kimathi was buried in Kamiti.

Silas Gacharia, the director of inspections, gave task force members a history of Kamiti before they were given a tour of the prison and to listen to two groups of prisoners. The prisoners mainly complained about corruption and delay in hearing their cases, which had caused them to spend more time in remand. The task force heard that prisoners often waited for as long as ten years for their appeals to be heard.

Statistics

No. of submission - 39
 In support of a commission - 31
 Opposed to a commission - 5
 Conditional support - 3





List of contributors:

1. Ng'ang'a Thiongo [Chair, RPP]
2. Hon. Njeru Kathangu
3. Mr. and Mrs. Patel
4. Kenneth Kituma Murichia
5. Rosemary Gadiha karuiki
6. Cyprian Nyamwamu
7. James Watenge (Special branch inspector
8. Otieno
9. Wafula Buke
10. Otieno MakOnyango
11. Mr. Paul Amina
12. Kuno,S. Abdi
13. Fatuma Ibrahim Ali
14. Amanywa Wafula
15. Mr. Kisemei wa Mutisya
16. Mr. Stephen Mutuku
17. Mr. Hassan Shah Ali
18. Rev.James Kimanthi kibunja
19. Peter Wambua
20. Wachira wahiri
21. Mrs. Jennifer Miano
22. Mr. Henry wa Ngure
23. Evans Gor
24. Mr. Ndimba
25. Mr. Kaleve Rodgers
26. Mr. Obure
27. Mr. Odhimbo
28. Dr. Lucas Munya
29. Tim Gitau

30. Mr Peter Njenga
31. Mr. Peter Ochieng
32. Leson Njiru
33. Noah Olumbe
34. Joseph Maina
35. Wanjiku Muhia
36. John Kabaka
37. Stella Juma
38. Head Teacher
39. Annastacia Njeri

Written Submissions

The task force received **five** written submissions:

1. Shailesh Patel
2. Citizens for Justice
3. Release Political Prisoners Group (RPP)
4. The Truth Be Told Network
5. The Children's Cabinet.

2.2 WESTERN PROVINCE

The Task Force conducted Public Hearings in Western Province from 24 - 26 June, 2003, in Kakamega and Kapsokwony.

Task Force members attending:

Ms Jane Kiragu – chairing
Ms. Zarina Patel
Rev. Patrick Rukenya
Sheikh Ali Shee
Dr. Amukowa Anangwe
Rev. Mutava Musyimi

Secretariat:

Mr. Ronoh Tumusing
Ms. Wanza Kioko

OVERVIEW

The Kakamega meeting got off to a slow start on 24 June 2003 due to poor communication between the task force and the provincial administration, which created the wrong impression that the hearings would start on 25 June.

Parts of Kakamega district bordering Nandi had experienced ethnic clashes in the past as had Mt Elgon between the Sbaot and the Luhya, communities.

FINDINGS

To set up or not to set up the commission

Majority of the people who appeared before the task force supported the establishment of a Truth, Justice and Reconciliation Commission.

Twenty-five persons out of the 34 who made submissions to the task force supported the establishment of a Truth Commission. **Eight** people out of the 34 were opposed to the idea of reconciliation being part of the commission's mandate. **One** person recommended that instead of reconciliation, the commission be called Truth, Justice and Compensation commission.

Nine out of the 34 people opposed the establishment of a truth commission

Those against the commission or the reconciliation aspect of the commission wanted justice. They demanded that the law be allowed to take its course. They equated justice with trials and punishment. Those opposed to the commission said they had seen many commissions before that had accomplished nothing. They felt that it would be another expensive exercise that would yield nothing and preferred rather that the government used the money to alleviate poverty and let bygones be bygones.

They proposed that instead of setting up another expensive commission to establish past injustices, the government should act on existing reports of previous commissions such the Akiwumi report, the Njonjo

report and many others. Some pointed out that the government knows who did what from the intelligence it has and should just act on the information unless. They saw the setting up of a commission as a diversionary tactic because it (government) has no intention of acting on the perpetrators of past injustices.

Others feared that the commission will open a Pandora's box and the country may not cope with all the issues that have to be dealt with if we begin digging into the past. They urged that the country draws the line and moves on. They also cautioned the task force against drawing any conclusions without deep reflection. They urged task force members to consider the possibility that most people who are supporting the establishment of such a commission are motivated by the perception that at the end of it all they will get money as compensation. The country cannot afford the money to compensate all those people who consider themselves victims of the previous regimes. One person expressly opposed the idea of compensating victims.

Three people called for the establishment of special courts.

In **Mt. Elgon**, only **16** spoke out of the 120 people who attended the public hearing due to time constraint. Because of the time limit, the task force opted to resort to a vote at some point. Fifty-five people supported the establishment of the commission while 31 were opposed. Thirty-four persons abstained.

Those against the establishment of the commission saw it as a ploy to derail the constitutional review process. They also felt it would exacerbate conflict and open old wounds instead of bringing harmony and healing.

In western province, therefore, **79** persons out of **119** people supported the establishment of the commission while **40** were opposed.

How and when the commission should be established

How

The commission should be set up by an Act of Parliament with constitutional protection. Only **three** people commented on the question "how". One person said that the commission should be constitutionally entrenched. Two persons said that it should be set up by an Act of parliament.

When

The commission should be set up as soon as is practically possible. **Eight** people made express contributions on when they think the commission should be set up. **Three** people said "now." **One** person said immediately. **One** other person said immediately after the submission of the report. **Four** people said as soon as possible. **One** person said before December 2003.

Membership of the commission

The general sentiment is that commissioners should be persons of high moral integrity. The commission should reflect the cultural mix of the nation as well as regional balance. It should comprise religious leaders, women, youth, elders, political leaders, lawyers, professionals, victims, perpetrators and civil society representatives. **One** person demanded that suspected violators must not sit in the commission. **Two** people demanded that victims should not sit in the commission. **One** person said that lawyers should not sit in the commission.

Terms of reference for the commission

The commission should investigate:

- Torture and detention without trial
- Political assassinations
- Land clashes
- Corruption
- Private militia and connected political violence
- Land grabbing
- Existing reports on human rights such as the Akiwumi report
- Various “mafia” allegedly associated with the three presidents: the Kiambu mafia under Kenyatta, the Rift Valley Mafia under Moi and now, the Mt. Kenya mafia under Kibaki.

Powers and privileges of the commission

Most contributors said that the commission should have adequate powers and privileges to carry out its mandate. The commission should be able to implement its own recommendations and not just recommend to government because from previous experience the government is known not to act on recommendations by commissions. The following powers were however specifically mentioned as befitting a commission:

Power to

- compel people to appear before it
- prosecute, order restitution and compensation
- investigate and reconcile people
- name culprits

Privileges

- Security of tenure and immunity for itself and members against legal action

Historical period to be investigated

Majority of the people who addressed this question wanted the period investigated to start from 1963. **Twenty-eight** people expressly made contributions on the historical period to be investigated. **Fourteen** persons expressly wanted the commission to start investigating from 1963. **Eight** people wanted it to start in 1895. **Two** people were for 1920. One person recommended 1954 when colonial rule turned atrocious and many freedom fighters were killed while yet another proposed 1969 when Tom Mboya was killed. One person proposed 1978 and another 1990 as ideal because it is when the political environment led Kenyans to increasingly demand more political space and respect for their freedoms, and every government official was on notice that certain actions were abusive and a breach of law and Kenya’s public morality.

Life of the commission

The general sentiment was that the life of the commission should be adequate for it to effectively carry out its mandate. Many also did not want the commission to sit for too long and become expensive exercise for the country in terms of money and time.

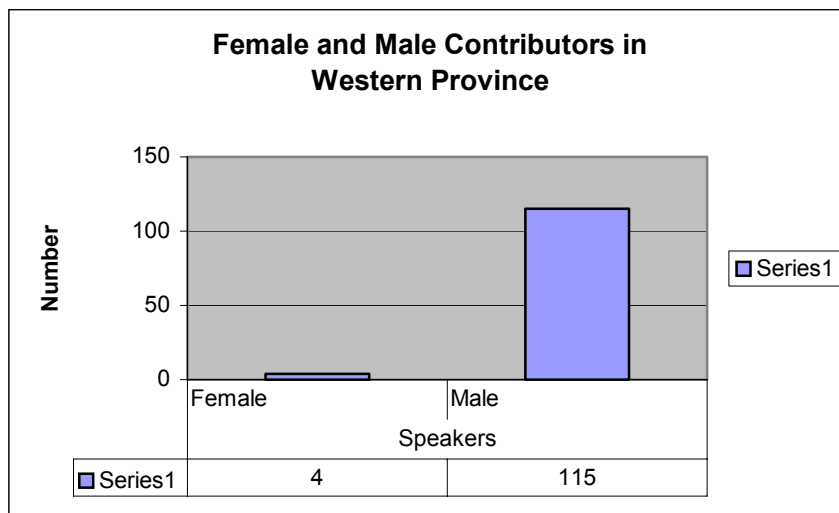
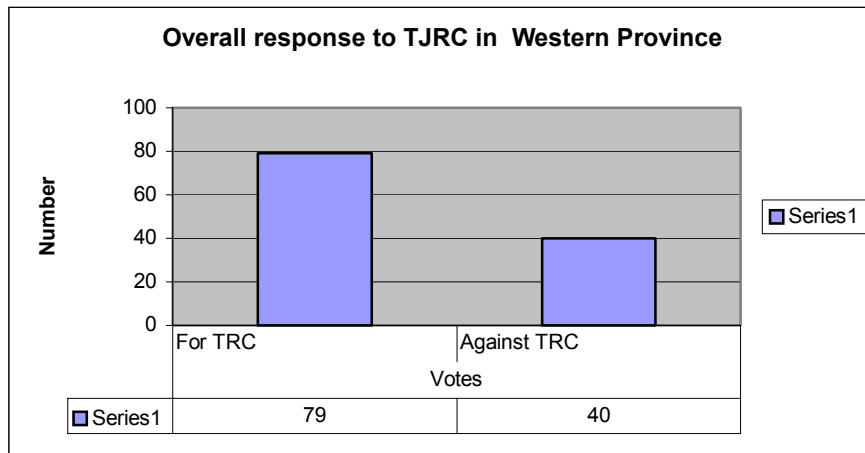
Nineteen people expressly stated how long they would like the commission to take to accomplish its mandate. **Six** people said three years while **five** people said one year and three people said five years. **Two**

people wanted a permanent commission; one person said six months; one person said 1-2 years and another suggested 3-5 years.

The cost should be factored in when deciding the life of the commission. Most people who rejected the commission cited the possibility of the commission being used to delay justice, so that the government can buy into national amnesia and therefore cheat Kenyans into inaction about past injustices.

Statistics

No. of submissions - 34
Supporting a commission - 25
Opposed to a commission - 9



List of contributors:

1. Nelson Aukwa Miega
2. Councilor Lawrence Oyando
3. Antony Muneria
4. Mposobowa Shikuku

5. Jenson Miti
6. Councilor Joseph Museno
7. Sammy Aswan Amuga
8. Kipkorir Kigai
9. Joseph Simiyu
10. Pius nye
11. Titus arap Mayek
12. CLLR John Adanti Musungu
13. Fr. Gabriel Dolan [Kitale Catholic Diocese]
14. Councilor James Chapati
15. Abdulaziz Mutange
16. Benson Osur
17. Rose Kiboi
18. Moses Keiyo
19. Hon. Joshua Angatia
20. John marcus
21. Wilberforce Koisero
22. Reuben Sanoi Mdara
23. Jethro kisanyi Oriedo
24. Leonard Njuguna
25. Bernadette mbwale
26. Vincent Sambulil
27. Musa Odondi
28. Munuvi Katwii
29. Fred Kavundi
30. Dr. Polycarp Kundembule
31. Richard Ikana
32. E.j Garu Wasaidia
33. Julius shikanga Nabuongu
34. Moses buwoya
35. Ojenga Okwe
36. Alfred Khamisi
37. Fred Sanende
38. William M. Kagwamba
39. Dr. Tubei Daniel
40. Gabriel Masinga
41. Dickson Kakarukha
42. Ibrahim Kweyu Sagana
43. Carol Mbugua
44. Cllr. Joshua Kusimba Ndubai
45. Isaac Sande
46. Abdullah Aleka
47. Tiger Machenja
48. Oscar Uhombo
49. Graham .K. Obima
50. Cllr. Palapala Mutesi

Written Submissions

1. Alfred H. Mchela – Mbalaka

2. Musa D.Odoni
3. Dr. Polycarp Kundembe
4. Fr. Gabriel Dolan
5. Jared Oteba Imai
6. Mwatikho - National Rehabilitation Centre for Victims of Tortures
7. Professionals from Mt. Elgon
8. Jethro K Oriedo

2.3 COAST PROVINCE

The Task Force conducted public hearings in the Coast Province from 16 -18 June, 2003, in Mombasa, Garsen in Tana River District.

Task Force members attending:

Mr. Davinder Lamba
Dr. Amukowa Anangwe
Ms. Jane Kiragu
Rev. Patrick Rukenya
Sheikh Ali Shee
Ms. Zarina Patel
Rev. Mutava Musyimi

Secretariat:

Ms. Wanza Kioko
Mr. Albert Tuli

OVERVIEW

Coast province has suffered tremendous violations of human rights. The key issues in the province gravitate around landlessness of the indigenous communities, insecurity, banditry, discrimination and inter-ethnic skirmishes that rocked the region preceding the 1997 elections.

FINDINGS

To set up or not to set up a commission

Majority of the contributors supported the establishment of a commission. **Sixty-eight** out of the **75** persons made submissions in support of a Truth Commission while **seven** were against it.

Five out of the 68 that support the establishment of a commission opposed the reconciliation aspect of the proposed commission. **One** person out of the 5 opposed to reconciliation recommended that the commission be termed *Truth, Justice and Compensation* instead.

Twelve of the 68 who supported the establishment of a commission wanted it to be a permanent feature of the country's justice system. **One** out of the seven against the establishment of the commission suggested instead that the government establishes the office of the ombudsperson.

How the commission should be set up

The commission should be established by an Act of Parliament.

Out of the **18** people who expressed themselves on the matter, **15** said that the commission should be set up by an Act of parliament while three people felt that it should be provided for in the new constitution.

When the commission should be set up

The commission should be set up as soon as practically possible.

Only **19** out of those that made submissions expressly stated when they would want the commission to start its work. **Two** people wanted it “now”. **One** person wanted it to start work “tomorrow.” **One** person wanted it immediately.

Nine people want it as soon as possible while four people wanted it set up quickly. **One** person wanted it set up next month (July) while another wanted it set up between July and September whereas another wanted it set up in September. **Three** persons wanted it established after the enactment of the new constitution, which would protect it from negative interference from powerful people in society.

Membership of the commission

Speakers were unanimous that the commission should be broad-based in membership.

Thirty-nine people out of the **75** people stated their preferred calibre of commissioners which included religious leaders, political leaders, women, youth, the disabled, professionals, scholars, lawyers, political scientists, farmers, teachers, historians, elders, wise people and judges. In addition, the commission should have regional balance i.e. reflect the face of Kenya.

Seven people out of the **39** said that politicians should not sit on the commission while **three** did not want lawyers in the commission. **One** did not want KANU in the commission while another wanted a commission of women only. One person also wanted a commission of ordinary people only; one wanted only ordinary people and religious leaders, while **three** people wanted international human rights defenders e.g. Amnesty International or Human Rights Watch represented on the Commission.

Terms of reference for the commission

The commission should be empowered to investigate:

- Land Clashes
- Torture
- Land problems
- Political assassinations
- Corruption
- Citizenship and marginalisation
- Insecurity (especially banditry)
- Existing reports of previous commissions

Powers and privileges of the commission

The commission should have powers to:

- prosecute
- order compensation
- investigate
- convict perpetrators
- Name names
- summon people to appear before it

The commission should have security of tenure

Period to be investigated

A majority of the people felt that the commission should investigate beginning from 1963.

Fifty-four out of the 75 people made submissions on the question of the historical period to be investigated. **Thirty-one** people said that the commission should cut off from 1963 while four people wanted it to start from 1895. **Six** others wanted it to start from the time of the coming of the Portuguese while **seven** people wanted the commission to be forward-looking and start investigations with the coming of the NARC administration. Two people wanted it to start in 1900 whereas another two chose 1990; one person 1993; and another 1997.

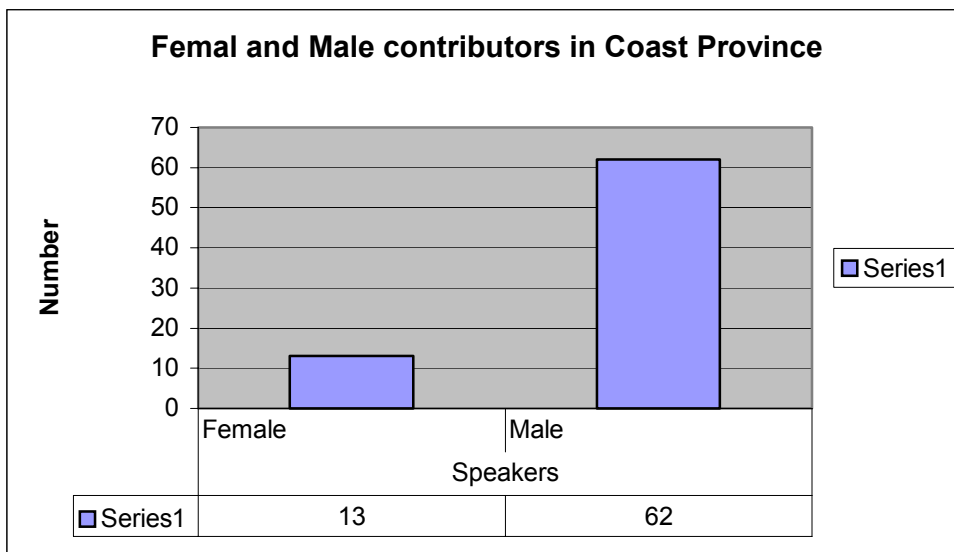
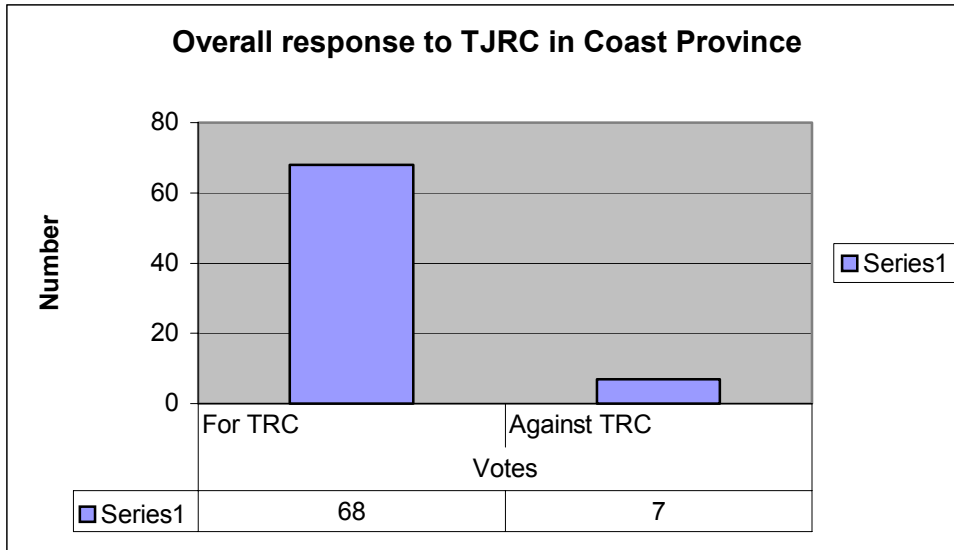
The life of the commission

The commission should have adequate time to do its work effectively.

Out of **75** people only **11** submitted on the life of the commission. **Two** people said that the commission should be given adequate time while two others said three months were enough. Another said not more than eight months while yet another said that the commissions should work as fast as possible. **Two** people said that the commission should be given a year to complete its work; one said less than three years; one person said it should report before the next general elections; while one gave the commission 5 years to complete its work.

Statistics

No of contributors	- 75
Supporting a commission	- 68
Opposed to a commission	- 7



List of Contributors:

1. Mokaya Arani
2. Martin Ndiga
3. Pastor James
4. Sheikh-
5. Elijah Mate Nthiga
6. Leslie K. Mwambura
7. Mzee Musa
8. Milicent Ouma
9. Stambuli
10. James Njoronge

11. Joseph Kimumu
12. Sheikh Khalifa
13. Dedan
14. Serah nzoka
15. Sheikh Omar
16. Susan
17. Francis Muigai
18. Adam Salim
19. Francis Oduor
20. Pastor Aggrey
21. Odonge
22. Matolo
23. John
24. Evans
25. Asha Hussein
26. Rukia Hassan
27. Esha Abdulamani
28. Githuki Mwangi
29. Micheal
30. Philip Oremo
31. Khalif Salim
32. Joseph Kimani
33. Seif Slim
34. Nuru Said
35. Stephen
36. Louis Ogutu
37. Grace Mwea
38. Speaker
39. Mwanzamba Mwaboza
40. Salim Alibashir
41. Athman
42. Fatuma
43. Musula
44. Abdi Omar
45. Juma Rajab Haji
46. Miriam
47. Tameem Hassan Ali
48. MP. Danson .B. Mungatana
49. Issa Umuru Kofa
50. Adde Dadacha
51. Abdullah Komorah
52. Khadija Ali
53. M. K. Diwayu
54. Abdikadir Sharif
55. Lysania K. Kigogo
56. Mathew Solomon
57. Said Shongolo
58. Justin Haribae
59. Jeremiah Igwo
60. Said Gor
61. Christian Mbatu

62. Bacha Korondo
63. Abdi Robule Gobu
64. Mohammed HAssan
65. Jilo Shung
66. Peter Aro Gwiyo

Written Submissions

The Task Force received **nine** written submissions from the following:

1. Dr. Edwin Mwinga
2. Mohamed H. Ngoto
3. The Kenya Long Distance Truck Drivers' Union
4. Mrs. Katharina
5. Postel Pensioners
6. Lt. Leslie Mwambura
7. John Omgany
8. Evans Changalawa
9. George Jilloh Kase

2.4 RIFT VALLEY PROVINCE

The Task Force conducted public hearings in Rift Valley Province from 16 to 19 June, 2003, in Nakuru, Molo, Narok and Eldoret .

Task Force members attending:

Prof. Makau Mutua -Chair
Dr. Josephine Ojiambo
Ms Mumina Konzo
Mr. Tirop Kitur
Mr. Julius Sunkuli
Mr. Kibe Mungai

Secretariat:

Ms. Wanjiku Miano
Mr. David Gathii

OVERVIEW

These areas were close to or scenes of the ethnic/land clashes between 1991 and 1997. Majority of the speakers in Nakuru and Molo were clash victims who gave testimonies of the suffering they had undergone since the clashes in 1992. While speakers enumerated various forms of injustices and human rights violations justifying the formation of a truth, justice and reconciliation commission, it was clear that land was the central issue in the Rift Valley.

Although the majority of those who presented their views favoured the establishment of a truth, justice and reconciliation commission, it also emerged clearly that victims not only wanted the government to recognise that violations had been committed, perpetrators punished and victims compensated for violations while those forcibly evicted from their lands reinstated or resettled.

In Narok, majority of the speakers did not support the establishment of a truth, justice and reconciliation commission. Land dispossession through successive regimes was a recurrent theme in many submissions. Speakers in Narok maintained that a truth telling process would be hollow in the absence of a preliminary process that would address land injustices meted against certain communities.

In Eldoret, one detected hostility that was directed at a certain ethnic community alleged to have dispossessed original inhabitants of the area of their land with the support of the Executive at the time. Inevitably, prevailing hostilities would persist if the government did not reconsider current land distribution policies.

FINDINGS

To set up or not to set up a Commission

Majority of those who presented their views favored the establishment of a truth, justice and reconciliation commission. Many speakers who supported a commission narrated their experiences of injustices suffered either during the colonial regime, Kenyatta and Moi administrations.

Most supporters were unanimous that the country was emerging from a dark past and needed truth to begin the healing process. They asserted that human rights violations had become the norm during past regimes, and because Kenya is in transition, a truth commission was necessary to avoid a repeat and restore the rule of law. Some speakers submitted that setting up of a truth, justice and reconciliation commission would assist Kenya become a united nation in diversity and not disintegrate into ethnic divisions.

Opponents

There were a few speakers who opposed the establishment of a truth commission, the most compelling reason being that those appointed in the past neither made their findings public nor implemented their recommendations. To start with, it was suggested that relevant reports of previously commissions be published and their recommendations implemented. Some opponents of a commission felt that there were more pressing national concerns to which resources for such a commission should be directed. They argued that commissions were expensive to the public and time-consuming. Speakers also expressed fear that such a commission was likely to be a witch hunt of members of the last regime, in which event the country would emerge perilously divided and unstable. Instead of expending resources on a truth telling process, opponents suggested that the government considers other priority areas of national reconstruction such as the resettlement of clash victims, compensation for violations committed and poverty alleviation.

Other speakers felt that existing structures and mechanisms were adequate for the purpose of truth and justice and ought to be utilised. They argued that courts of law should be used to address human rights violations and other injustices.

The need for another protracted process for seeking solutions and remedies was questioned. Some speakers noted that in certain instances, perpetrators were known and victims too, especially those displaced from their land through ethnic violence. It does not require a truth commission to prosecute perpetrators who are known or resettle clashes victims who have evidence of ownership of land from which they were forcibly and violently evicted.

Few were against the establishment of a truth commission for fear that it would reopen old wounds and cause pain and anguish to victims.

How and when the commission should be established

How

Supporters of the establishment of a Truth, Justice and Reconciliation Commission asserted that it was only through an Act of Parliament that the proposed Commission would be insulated against manipulation. Those who proposed this mode, expressed confidence in their elected representatives who would vote for the Commission when it came up for debate in parliament.

Some speakers opposed a Presidential Commission because past experience had shown that such commissions never lived up to public expectation owing to executive interference.

Some suggested that the Commission be established by the president, but suggested that the bill on the Commission be referred to the National Assembly for voting.

It was also suggested that the Commission be entrenched in the constitution to guarantee its protection, with some proposing that the commission be made a permanent structure.

When

The Commission should be established immediately.

Supporters of a truth, justice and reconciliation commission said it was long overdue. Others proposed that about one year from the date of submission of the report to government by the Task Force was reasonable.

Others felt that the commission should await the outcome of the National Constitutional Conference so as to determine whether the National Commission on Human Rights and Administration of Justice would be the Commission, or it would address aspects of the work of a truth commission.

It was also proposed that the Commission be established after the draft constitution has been enacted and become operational. Some felt that it was only within a solid constitutional framework that the Commission would effectively function and execute its mandate.

Membership of the commission

The commission should be broad based and all-encompassing.

Most speakers seemed to agree on the need to;

- appoint competent persons from diverse disciplines
- consider women, the youth and persons with disability
- nominate persons from all regions of Kenya to ensure the Commission reflects national diversity

A proposal for victims to sit on the commission was rejected on grounds that they would not be objective and therefore, unlikely to ensure fairness and justice. On the whole, there was no contest on the need for an independent, and impartial commission.

Terms of Reference/Powers and privileges of the commission

Speakers recommended that the commission be empowered to deal with a wide range of issues, including:

- Plunder of the economy
- Political assassinations and murders
- Massacres (Lari, Wagalla, Kisumu, etc.)
- Ethnic clashes
- Torture by law enforcement agents
- Environmental degradation
- Land grabbing and dispossession
- Exploitation of workers
- Denial of basic rights

It was also proposed that the commission be empowered to summon persons before it to give evidence and recommend prosecution, compensation, resettlement, restitution, or other suitable relief. It was proposed that the commission and commissioners be made immune from legal action and granted security of tenure.

Speakers also suggested that the more complex matters be referred to the judiciary while few speakers proposed that the commission be empowered with unfettered jurisdiction over all matters before it.

Period to be investigated

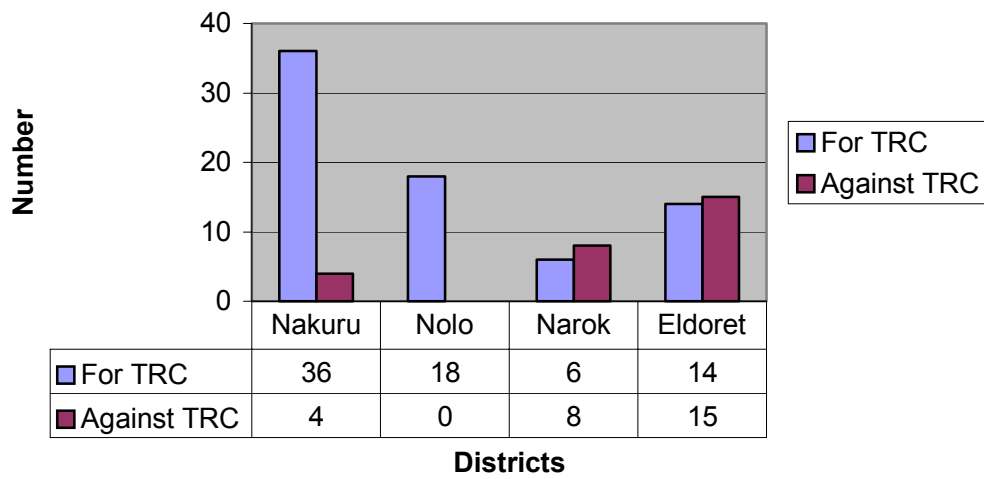
The following periods were proposed by those who supported the establishment of a commission;

- *From 12 December 1963 to date:* Majority of the speakers favoured the post independence period when Kenya attained self rule. This, they argued, made it easy to hold accountable those who were responsible for wrongdoing.
- *From 1952:* There are those who strongly felt that the violations committed by the colonial regime must be probed and chose to focus from when the state of emergency was declared in Kenya.
- *From 1920:* Two speakers proposed this period because it is when Kenya was formally declared a colony by the British, precipitating many violations against Kenyans which have had profound ramifications on the social, political and economic character of Kenya.
- *From 1895:* Others proposed that the commission commences investigations from the period when the Imperial British East Africa (IBEA) took over the colonial administration of Kenya.
- *From 1897:* Few speakers recalled that during this period there had been a marked influx of settlers who had began alienating land in Kenya, and for this reason it was a suitable period from which to begin investigations.
- *From 1885:* Some speakers said some problems, particularly relating to land, could only be traced back to colonialism. Therefore, to diagnose existing problems accurately and proffer appropriate solutions, it is necessary to go back in time to the Berlin Conference.

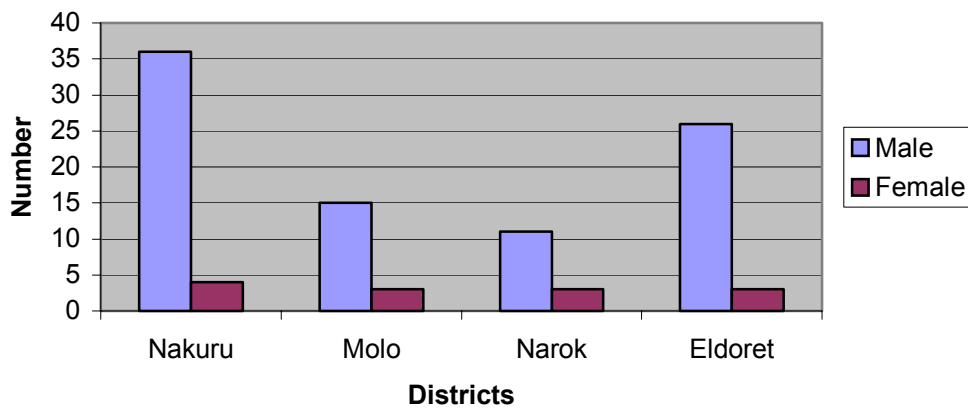
Statistics

Total number of submissions	- 101
Supporting a commission	- 74
Opposed to a commission	- 27

Overall response to TJRC in Rift Valley Province



Female and Male Contributors in Rift Valley Province



List of contributors:

Nakuru

1. Joepl Chirchir Kpkurui
2. Geoffrey Kiplagat Kenduiywo
3. Martha Nyaga
4. Bright Oyela Amayame
5. Richard Lagat sigilai
6. Haggai Kagiri
7. David Kimani
8. Kimunya Kamana
9. Harriet Macharia
10. Peter Cheruiyot
11. Kings Maina
12. Ngali Valai
13. John Muchiri Gikunga
14. P.C Kinuthia
15. Sammy arap Seroney
16. Roselyne Lai
17. Job Seng'eng'e
18. John Njenga Wainaina
19. Odhiambo Swar Mc Oduor
20. Mark Mwithaga
21. John Kiprotich Basi
22. Cyrus Waweru
23. Francis Shinali
24. Wycliffe Agega
25. Paul Muraya
26. William ole Kisaun
27. John Kahato
28. John Karanja
29. Aaron Mbugua
30. Karanja Quindos
31. Peter Wanyeti
32. Simon Ruga
33. Nicholas Ochodho
34. Kipsiele L.A Ng'eno
35. V. Ondedo
36. Michael Mahugu
37. Francis Chege
38. Reuben Irungu
39. Arthur T
40. Linus Mokoro

MOLO

41. GG. Njuguna
42. Anthony Njogu
43. Manasse Njuguna

44. Veronica Gathoni Mwai
45. David Karumba Maina
46. James Waweru
47. Ezekiel Rono
48. Mary Njoki chege
49. Speaker X
50. John Obati
51. Joseph Mungai
52. Ngere Ngatia
53. Muhinda
54. Magdalenme Wamboi
55. Monica Njeri
56. Councilor Paul K
57. Stephen Kamau
58. Chair, Molo Town Council

NAROK

59. Segeyo Ole Ntaiya
60. Shadrack Korutei
61. Patricia Saniriaki
62. Moses Ole Mari
63. John Maitai
64. Agnes Kureiyo
65. Pauline Tuya
66. William Ole Supeyo
67. Ole Yaile William
68. Salam Kapapa
69. Hon. William Ole Ntimama
70. Eunice Marima
71. Kelena ole N'toye
72. Joseph Ngadado

ELDORET

73. Salaam Joshua
74. Arap Joel
75. John Nderitu
76. Farouk Kibet
77. Kiprokiri Menjo
78. Geoffrey Sang
79. Rev. Nyoro
80. Wilson Mutai
81. Nelson Ngethe
82. Emmy Busoe
83. Barasa
84. Raphael Wambua
85. Tecla Otuodi
86. Paul Kibe

- 87. Counc. Keter
- 88. Martin Githongo
- 89. Simon Kibor
- 90. Carolyne Chemusoi
- 91. Josephat Maiyo
- 92. Nelson Wambugu
- 93. James Tamu
- 94. Njoroge
- 95. Hassan
- 96. Prof. Tirop
- 97. Counc. Julius Kuchedi
- 98. David Martin
- 99. Counc. Haida Kosgei
- 100. Zachary Mwangi
- 101. Councillor Bii

2.5 NYANZA PROVINCE

The Task Force conducted public hearing in Nyanza Province from 23 – 25 June, 2003, in Kisumu, Kisii, Gucha and Kuria.

Task Force Members present:

Prof. Makau Mutua - Chair
Dr. Josephine Ojiambo
Mr. Julius Sunkuli
Mr. Kibe Mungai

Secretariat:

Ms. Wanjiku Miano
Mr. David Gathii

OVERVIEW

Speakers at the public hearings in Nanza voiced urgent need for the establishment of a truth, justice and reconciliation commission.

In Kisumu, a recurrent theme among many speakers was political assassinations and murders that had allegedly deprived the Luo community of visionary leaders. Speakers also decried the plunder of national resources, economic destruction, collapse of the sugar and cotton industries, ethnic violence in Muhoroni and other parts of the country, land grabbing, environmental degradation, non-recognition of liberation heroes, torture and political repression.

In Kisii, speakers urged for efforts to reinforce on-going community level initiatives in laying to rest border, inter-tribal conflicts and involvement of women in peace initiatives.

Marginalisation, discrimination against women and the girl child due to oppressive traditional practices also featured prominently in Kuria.

Skepticism was expressed about another commission because of past experience with multiple commissions and task forces that had been established but findings had not been made public or acted upon.

FINDINGS

To set up or not to set up a Commission

Majority of those who appeared before the Task Force supported the establishment of a truth, justice and reconciliation commission in view of the improved obtaining environment, which encourages openness and free expression.

Proponents submitted that such a commission was necessary because existing mechanisms of dispute resolution such as courts of law had been compromised by past regimes. Speakers argued that in order to solve prevailing problems, full disclosure of truth was a prerequisite for national healing.

Some speakers cautioned that the process could shortchange Kenyans and victims if compensation, restitution, reparation and prosecution were not pursued where circumstances so dictated.

While majority spoke in favour of a truth commission (see figures below), they also advised against seeing such a commission as a compensation processing and prosecution structure. Hence, some speakers saw more added value in forgiveness and reconciliation as the ultimate outcomes at the discretion of victims and perpetrators.

Proponents of a truth commission considered it as a panacea for ethnic tensions and a vehicle to lasting harmony and national integration.

Some speakers said that in order to avoid unreasonable expectations and disillusionment with the proposed truth commission, the public will need to be sensitised on the role and objectives of the commission. Unreasonably high expectations would put the commission into disrepute.

The primary objective of such a commission would be to restore confidence among Kenyans as a nation and begin anew.

Opponents

A few speakers opposed the establishment of a truth commission because of the high number of commissions that have been established in the past to no avail. Their confidence in such mechanisms had considerably been eroded and the government should on perpetrators of human rights violations who were known. They instead recommended expeditious restructuring and strengthening of the capacity of the judiciary to try perpetrators and handle complexities that might attend certain cases. In instances where victims of torture and ethnic clashes had documented evidence of loss, it was suggested that a program be commenced of scrutinising claims that have been forwarded with a view to awarding compensation.

Speakers also suggested that resources intended for the commission be used in economic revival efforts, compensation, and strengthening strategic institutions in facilitating transitional justice, such as the judiciary.

It was also contended that the process of excavating truth could easily plunge the nation into more antagonism. Hence, there was no need to rekindle painful memories about the past and disrupt nascent communal peace and stability.

How and when such a Commission should be established

How

Most presenters supported the establishment of a commission through an Act of Parliament.

Speakers suggested that legislators were accountable to the people, and had a responsibility to the nation to endorse a popular bill on the establishment of a truth commission. Parliament was considered a safe route for the reason that a body created by statute would be protected against frivolous suits and manipulations, and its independence from the executive guaranteed. Presidential commissions were too fragile to be trusted as they could easily be disbanded at the whims of the president, it was pointed out.

Presidential Commission

Proponents of a Presidential Commission expressed fear that routing the commission through parliament might be protracted. Speakers in favour of a presidential body also cautioned that perpetrators in previous regimes were in the current parliament, and were still politically and economically influential to frustrate a bill. With the instruments of power at their disposal, such legislators could scuttle the process, and ensure the bill is never debated in parliament. On these grounds, they deemed a presidential commission to be the certain and safe avenue provided that there was assurance that the commission would be accountable to the public, free from interference by the executive and independent in its operations.

When

Speakers in all the areas visited proposed the expeditious formation of the truth commission.

Some felt that it was long overdue and quipped that the Task Force ought to have been the commission. They proposed that the truth commission be established between six months to one year from the date of submission of the report by members of the Task Force. Speakers reasoned that the enthusiasm by both the government and the people provided the necessary impetus for the formation of a truth commission and warned that the euphoria could wane if it takes longer than the next two years of the new government's existence.

Membership of the commission

There was unanimous need for persons of integrity and competence in their respective fields of expertise to be appointed commissioners.

Submissions were also made for the commission to reflect national diversity by ensuring that persons from all regions were considered.

Various professionals such as lawyers, doctors, social workers, economists, psychologists, and anthropologists were proposed. It was also proposed that clergy, women, the youth, the disabled, and minority groups be considered for appointment.

Terms of Reference/Powers and privileges of the commission

Victims who spoke identified strongly with the nature of violations that they had suffered but were not opposed to the truth commission investigating a broad spectrum of human rights violations and other injustices. The following were proposed as matters for the commission to address;

- Political murders and assassinations
- Corruption
- Collapse of the economy
- Ethnic clashes,
- Environmental degradation
- Land grabbing
- Cattle Rustling
- Border conflicts
- Rape of women and girls
- Marginalisation of women and girls
- Widow dispossession (property)
- Torture and arbitrary killings by law enforcement agents

- Inhuman treatment of prisoners
- Harassment of farmers
- Harassment of hawkers and slum dwellers
- Inhuman treatment of prisoners

Speakers contended that it was necessary to establish what happened and why. In meting out justice, it was recommended that the commission be empowered to issue summons, to order prosecution, compensation, restitution, reparation or resettlement on the basis of the merits of each case. They contended that this would distinguish the truth commission from past commissions, which lacked authority, and were therefore ineffective. But speakers wanted judicial powers to remain with the courts.

Period to be investigated

Those who spoke in support of the formation of a truth commission proposed varied periods.

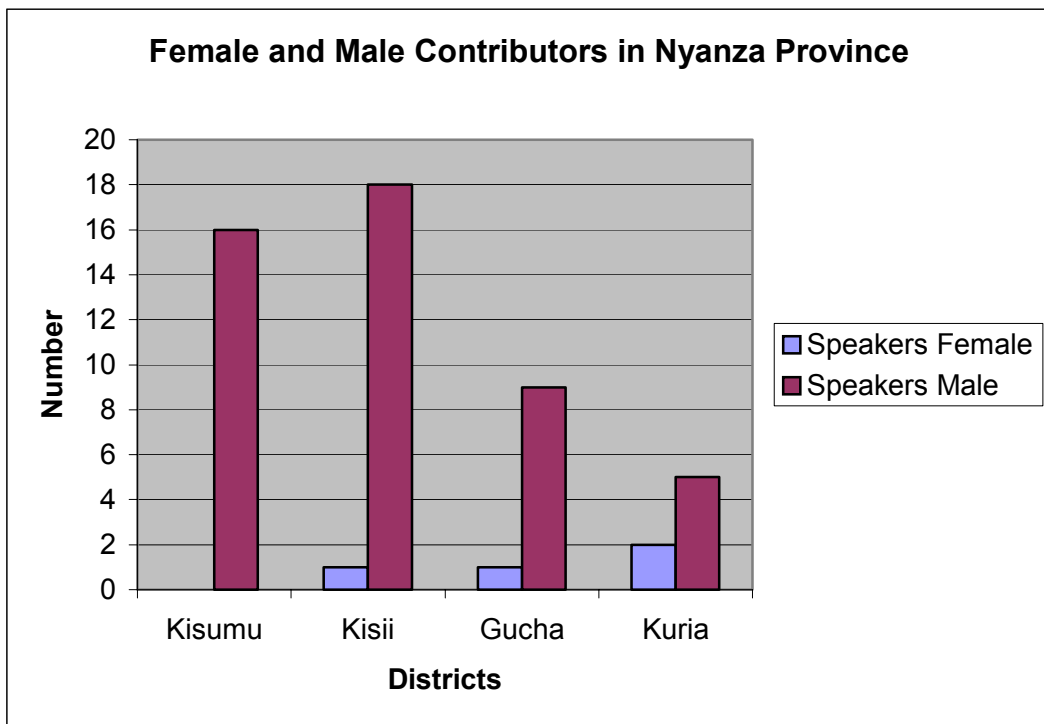
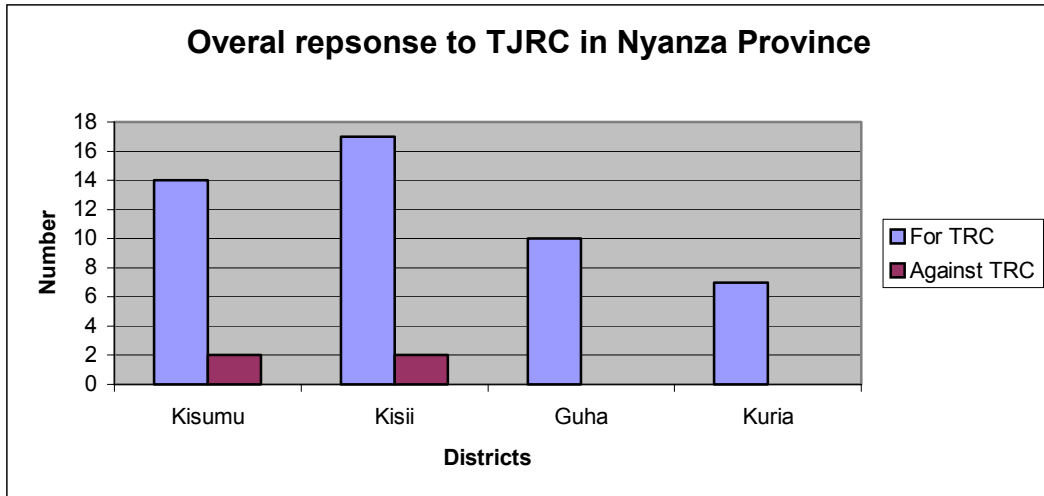
- *12 December 1963 to Dec. 2002:* this was the period most preferred because it defines the period when Kenyans became responsible for their governance. This makes the case for holding accountable those in whom trust and power to lead the nation reposed.
- *From October 1952:* It was argued that most of the human rights violations and bad governance witnessed during the 40 years of Kenya's independent history was a direct result of colonialism. The misrule was perpetuated by successive regimes. Therefore investigations ought to pre-date 12 December 1963 to cover the declaration of emergency in Kenya.
- *From 1980:* A speaker was of the view that it was during this period that human rights violations became pronounced and therefore should be the beginning point for the truth commission.
- *From 1978:* Few speakers proposed that the truth commission investigates injustices committed during the Moi regime since cogent evidence would be available in a number of cases.
- *From 1969:* One speaker cited this year as the beginning of the deterioration of the rule of law and intense political repression.
- *From 1885:* Two speakers suggested that the truth commission revisits events from the partition of Africa by major imperial powers at the Berlin Conference.

Other periods for which no concrete reasons were advanced are 1950, 1965, 1966, and 1970.

Statistics

Number of submissions

- 55



List of contributors

KISUMU

1. John Oloo, B
2. Fredn Omondi Oyoo
3. Adira Osawa
4. Onyango Lazaro
5. Agwanda
6. Charles Atyang Atyang
7. John Bruno Oloo
8. Nicholas Atieno Omolo
9. William Ochiegn
10. Stephen Otieno
11. Cyrus Yuji
12. John Ongele
13. Mohammed Aslam Khan
14. Adhiambo Lomo
15. Bernard Omondo Otieno
16. Ben Outa Onyango
17. Owuor Jacob Mark

KISII

18. Bishop Omesa Omango
19. Jackson Maboro
20. DC Abdulahi Leloon
21. Abdullahi Irisora Ongaga
22. Moses Maranga
23. Anonymous speaker
24. Richard Otundo
25. Michael Nyabuto
26. James Omariba
27. James Oloro
28. Nyaberi Arane
29. Joseph Otieno mwai
30. Charles Ayieny
31. D.O Maranga
32. Nyanjera Thomas
33. Silvanus Onymabu, O
34. Ogeto Odori
35. George Bitange Ng'weno
36. Norah Mutema
37. Samwel Mirima Bunde

GUCHA

38. Peter Nyandulia
39. Innocent Nyandiro
40. Evans Nyambaso Zedekiah
41. Bernard ole Maki

42. James Oyaro Kangare
43. Tom Okworo
44. Nahashon Orenge
45. Priscilla Ombonja
46. Jackson Amia Ogeto
47. James Osiero
48. Francis Marangi

KURIA

49. Charles Wambura
50. Benedict Mwita
51. James Muochi
52. Peter Nyanyaga
53. Minyiri Jackton Otieno
54. Beatrice Robi Mwita
55. Rose Marwa

2.6 CENTRAL PROVINCE

The Task Force conducted public hearings in Central Province from 16 - 18 July 2003, in Nyeri, Murang'a and Kiambu.

Task Force Members attending:

Prof. Makau Mutua –Chair
Rev. Timothy Njoya – Vice Chair
Rev. Patrick Rukenyia
Ms Mumina Konzo
Zarina Patel
Sheikh Ali Shee
Bishop Prof. Zablon Nthamburi
Mr. Tirop Kitur
Dr. Amukowa Anangwe
Mr. Kibe Mungai
Mr. Davinder Lamba
Rev. Mutava Musyimi
Dr Josephine Ojiambo (attended Kiambu only)
Ms Roselyne Lagat-Korir (attended Kiambu only)
Mr.Kairichi Marimba, OP, Ethics and Integrity Dept. (attended the Kiambu meeting only).

Secretariat:

Ms. Wanjiku Miano
Mr. Rono Tumusing
Mr. James Waititu
Mr. David Gathii

OVERVIEW

The public hearings in Central Province were generally poorly attended. Nevertheless, most speakers were unanimous on the need to establish a truth, justice and reconciliation commission in Kenya. Support for the commission was justified on the basis that Kenya is a fragile nation because of the festering wounds of violations meted on citizens by successive regimes. The overwhelming feeling was that the country needs to make a clean break with an imperfect past through a national healing process.

A two-tier commission was proposed to address injustices during the colonial and post independence periods. Land grabbing and the collapse of the tea, coffee, and dairy industry, and emerging cartels that have frustrated the local farmer, were recurrent themes in submissions. Others were the non-recognition of liberation heroes, and consequent betrayal by the ruling elite (the case of Jimmy Beuttah, and Bildad Kaggia), inequitable distribution of national resources, the plight of ethnic clash victims, rape of women, the violation of property and inheritance rights of women, atrocities committed against the Mau Mau by the colonial regime, torture and killings by law enforcement agents. The confiscation of Asian businesses by elite Kenyan entrepreneurs in the 1960s was also raised as an injustice that needs attention.

Several speakers proposed that reconciliation should be excluded as it is a voluntary action that ought to be left to concerned parties and determined by different circumstances.

FINDINGS

To set up or not to set up a Commission

All those who presented their views supported the establishment of a truth, justice and reconciliation commission.

Some presenters submitted that a commission would provide an ideal forum for Kenyans to ventilate their bottled up pain and anguish from years of suffering.

Others contended that the reason why violations occurred on a massive scale was because the judiciary had degenerated like all other institutions of governance. The fact that it was no longer accountable to the people made it a tool in the hands of the rich and mighty. The judiciary was considered inept and lacking the capacity to handle complex transitional justice issues.

Speakers argued that there was need to know the truth about what happened as a first step towards healing. Such a commission would record evidence from the past that would help retrace the steps and rewrite history from a perspective of knowledge and experience.

Speakers cautioned against the narrow perspective of punishing perpetrators and compensating victims. Those subscribing to this view saw forgiveness and reconciliation as overriding, and advised that greater emphasis be laid on the two elements, otherwise they feared that Kenya would emerge a bitter and bruised nation in need of further healing after the commission.

Even though most contributors supported the commission, some were skeptical of the eventual outcome because of past experience.

How and when such a Commission should be established

How

The Commission should be established through an Act of Parliament.

Majority were of the opinion that a commission established by statute was more certain in terms of its tenure than one appointed by a president. It was also safeguarded against manipulation, executive whims and usurpation of its role.

Some speakers, however, argued that while they would not mind a commission created by statute, the process of legislation meant delaying the urgent commission. Support for a presidential commission was based on the fear of the intricacies of parliamentary and the disparate interests of legislators some of whom were suspected perpetrators of atrocities.

A few proposed that the commission be entrenched in the new constitution for its protection, but also wondered how such a structure would interface with similar proposed structures in the draft constitution.

When

There were varied views by the presenters on when the commission was to be formed. Some argued it should be within a year from the date of the submission of the report by the Task Force. Others thought that the commission was a significant national process that should not be dwarfed, hence the moment of its creation should be opportune. Proponents of this view, recommended the formation of the commission after the constitution review process and the Goldenberg commission.

Membership of the commission

Most submissions proposed qualities that would serve as criteria for appointing members of the commission. It should:

- Reflect national diversity - ethnic, youth, women, the disabled, among other representatives of marginalized and vulnerable groups.
- Comprise persons of integrity and who were beyond reproach
- Comprise persons with relevant competence and experience in their respective fields
- Include professionals. It was proposed that few be lawyers while the majority be drawn from peacemakers, and experts in conflict resolution, trauma counselors, doctors, economists, social workers, clergy and anthropologists
- Comprise perpetrators and victims were considered undesirable for membership

Terms of Reference/Powers and Authority of the commission

Speakers recommended that the commission be empowered to deal with a wide range of issues including;

- Plunder of the economy, and collapse of industries in the agricultural sector
- Atrocities committed by home guards and the colonialists against freedom fighters
- Political assassinations and murders
- Massacres (Lari, Wagalla, Kisumu and others)
- Ethnic clashes
- Torture and killings by law enforcement agents
- Saba Saba events
- Land grabbing and dispossession
- Denial of women's property rights
- Denial of basic rights
- Social justice

Powers and privileges

It was proposed that the commission be empowered to summon persons before it to give evidence and recommend the best cause of action, i.e. prosecution, compensation, resettlement, restitution, or other suitable relief. It was also proposed that the commission could offer selective pardon depending on each case but full disclosure ought to be a prerequisite, accompanied by restitution or other penalty. More complex matters for prosecution were to be referred back to the judiciary. A few speakers proposed that the commission be empowered with unfettered jurisdiction over all matters before it.

Speakers recommended that the commission be granted security of tenure to prevent its arbitrary disbanding.

Period of investigation

Several periods were proposed as follows;

12 December 1963 to Dec. 2002: Majority of the speakers seemed to favour the post independence period when Kenya gained self-rule.

From 1952: Some speakers proposed that violations committed by the colonial regime be probed from when the state of emergency was declared in Kenya because these violations set a self-perpetuating precedent

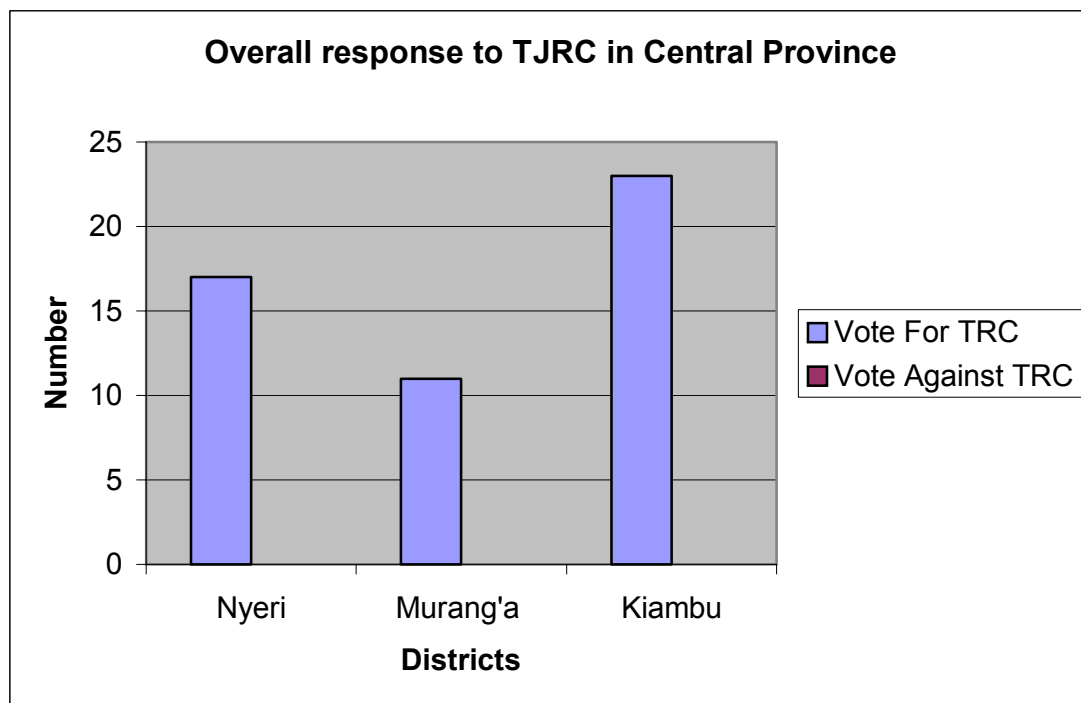
From 1885: A few speakers were of the opinion that the problems in Kenya today, particularly relating to land could only be traced back to imperialism. Therefore to be able to diagnose existing problems accurately and proffer appropriate solutions, it was necessary to go back in time to when some territories were partitioned at the Berlin Conference by major European countries.

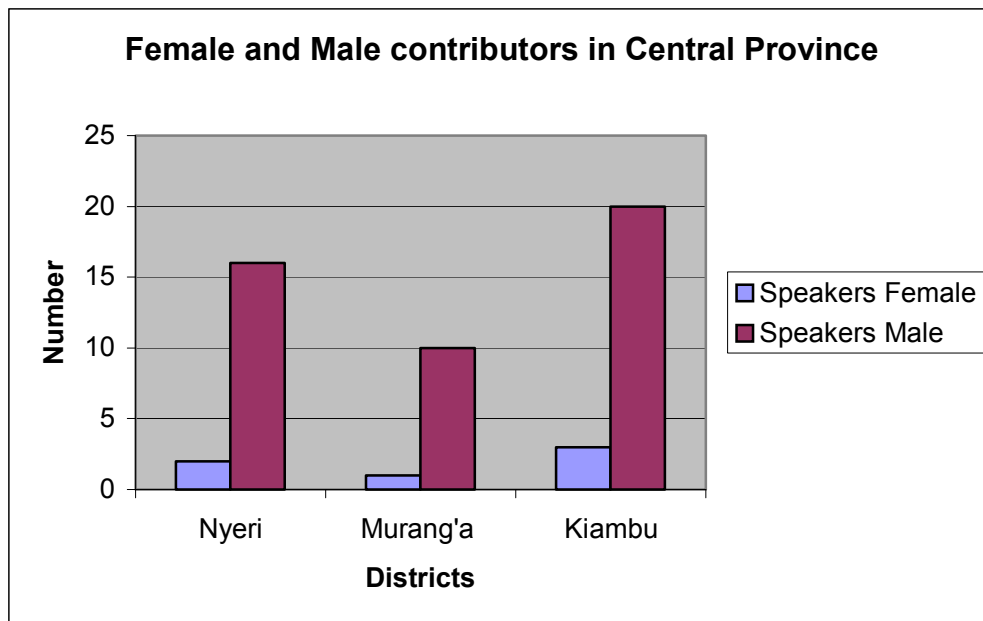
Statistics

Total No. of submissions - 52

Supporting commission - 52

Opposed to a commission - 0





List of participants:

- | | |
|---------------------------|--------------------------|
| 1. B.K Mathenge | 28. Kabugwa |
| 2. Boniface Gichuki N. | 29. M.N. Musyimi |
| 3. Shadrack M. Gitonga | 30. Patrick Waigwa |
| 4. James Ndungu T. | 31. Eunice Nyaitaha |
| 5. James Gatama | 32. George Ndirangu K. |
| 6. Rev. Jamlick M. Miano | 33. Velonica M. Mundia |
| 7. Julius Miriti Magambo | 34. Jackson Kiriaita |
| 8. Richard Muahi | 35. Francis N. Mwangi |
| 9. Hon. Peter G. Miriithi | 36. Patrick Gitonga |
| 10. Wilson Wanyeike | 37. Kabiru Richard |
| 11. Munyi Wa Goro | 38. Ndiritu H. T. |
| 12. James Mwangi G. | 39. Velonica N. Mundia |
| 13. Baragn Mutahi | 40. Richard K. M. |
| 14. Francis Kiboi Wachira | 41. Maalim Abdullahi |
| 15. James Wamburu | 42. James Mwongera |
| 16. Julia Wambui | 43. Joseph Kirimi |
| 17. Jane Nyambura | 44. Daniel Kimaru |
| 18. Hawa Wangeci Ngatia | 45. Joseph Mbugua |
| 19. Meshack G. | 46. Peter Kamau Waithaka |
| 20. Mwende M. | 47. Joseph Kiberia |
| 21. Michael Rambo | 48. Shadrack Muter |
| 22. Stephen K. Wahinga | 49. Julius M. Kiboi |
| 23. M. Gachara | 50. Ndungu Makara |
| 24. Ephraim Karani | |
| 25. Cleopus W. Mathu | |
| 26. W.K. Kubai | |
| 27. S. Kuguru | |
- Murang'a**
51. Sammy Kahura Muriuki

52. Karuri Francis G.
53. Leornard Ndungu
54. David Karugo Mugo
55. Cyrus K.
56. Martin Telewa
57. Imam Abduillahi Ali
58. Halima Haji
59. Salim Karigita
60. Feisal
61. Ali Yusuf
62. Ndegwa
63. Thuo James Frank
64. Jimmy J. B.
65. Julius Macharia Kimani
66. Joseph G. Mbugua
67. Stephen Kariithi Mwaniki
68. Orungu Kang'ata

Kiambu

69. Maina Kariuki Ngotho
70. Karori Karanja
71. Sarah Wanjiru Njoroge
72. Peter Muiruri
73. Mithamo Kariuki
74. Njoroge Wanguthi
75. Njoroge Waweru
76. Jane W.K.
77. Benson Maina
78. Kaniaru Njogu
79. D.K.Munuwe
80. David Njenga Ngugi
81. Njuguna Mwangi
82. Margret Wambui Mwangi
83. Daniel Mutie
84. Karanja Gikungu
85. James Gicheru Karanja
86. Peter Njenga
87. Paul Mwaura Mungai
88. Gitu Wa Kahengers

89. Gabriel M. K.
90. David Kibunja
91. Willam N. Kimani
92. John Njuguna
93. John Mwangi
94. Franics Njagi
95. Benard Njenga
96. Pius Mungai Njenga
97. Frank Nyagah
98. J.N. Ndegwa
99. Ndito Mwangi
100. Ndungu Wakirogo
101. Joseph Rutere
102. M.A. Charagu
103. Mathenge John
104. Kamau K.
105. Teresia
106. Esther Wanjiru
107. Alice Wanjiru
108. Ayub Makimei
109. Bernard N.
110. P.C Kuria Gathuru
111. Stephen Njuguna
112. David Mwathi
113. Mwangi Thuku
114. Joe Nyagah
115. S.K. Kamau
116. Ng'anga Waweru
117. Gitau Mwara
118. George Gachau
119. Clement Kamau
120. Michael Njenga
121. Titus Wainaina
122. Katee Mwanza
123. Mwangi Patrick
124. William Mwangi
125. Paton Kimathi

2.7 EASTERN PROVINCE

The Task Force conducted public hearings in Eastern Province from 25-27 June, 2003, in Machakos, Meru and Isiolo.

Members of the Task Force attending:

Rev. Timothy Njoya (Team Leader)
Mr. Davinder Lamba
Mr. Tirop Kitur
Ms. Mumina Konso
Ms. Raychelle Omamo (did not attend Meru and Isiolo sittings)

Secretariat:

Mr. George Gathi
Mr. Edwin Maloba
Mr. Ronoh Tuimising

OVERVIEW

The team was not able to visit the areas that were considered by the provincial administration to have been prone to injustices and human rights violations in the past – i.e. Moyale, Maua and Nyambene. Moyale, which lies on the border, has suffered from incursions by Ethiopian warriors while Maua and Nyambene have experienced ethnic clashes.

The turn out in Meru was low. Only 18 and 15 people attended on the first and second respectively. Only 2 women turned up for the two days, but none of them made a submission. The team had to wait for over 3 hours on the second day for the members of the public to start arriving. The poor turn out was attributed to poor mobilisation by the Provincial administration.

At **Machakos**, 52 people attended the public hearing, among them 6 women.

The turn out was impressive in Isiolo with over 200 attending and 40 persons testifying. In order to reflect the ethnic diversity of the district, the participants divided themselves into groups and spoke through selected spokespersons. Many others who wished to speak but had no opportunity for want of time handed in written submissions. Generally, the submissions were based on the erroneous perception of the mission of the Task Force and most did not strictly answer to the terms of reference.

One woman spoke about the injustices against women in Isiolo and throughout northern Kenya districts which have suffered from banditry and cattle-rustling in the course of which women have been raped, abducted, beaten, impoverishment, married or forcibly cohabited.

FINDINGS

To set up or not to set up a commission

On the whole, most submissions supported the establishment of a commission to investigate political, social, economic, land-related and religious wrongs committed since the colonial period.

A commission is necessary to correct the wrong history about Kenya that is found in books as the 'official' history of Kenya. This is historical injustice, which needs to be corrected through the exposure of the truth about Kenya.

A few were, however, opposed to the establishment of such a commission because there already exist capable state machinery and systems to address those wrongs. What Kenya needs is therefore the strengthening of those institutions, not the creation of new ones. Several submissions called for a clean break with past commissions whose findings have not served any useful purpose because they were never made public yet public funds had been expended.

Those who supported the commission especially in Isiolo, did so in the hope that it will compensate and correct wrongs and suffering caused to them since the colonial period. Some speakers stated that for them independence is yet to come as they still live in hostile conditions, fighting among themselves and ravaged by withering poverty. It was claimed that between 1947 and 1957, over 4000 people were massacred by the colonial regime and others killed in concentration camps during the emergency period.

Reconciliation to them is a strange concept in the face of the atrocities they have suffered. A commission is viewed as their vehicle to economic justice for lost livestock and property as well as compensation for their suffering.

Those *opposed* to the commission said it would be a waste of scarce public resources and valuable national time. They posed the questions – the commission will reconcile whom with whom? Forgive what? From whom shall the truth be extracted – the government, or its one-time diehards? They submitted further that what Kenya needs is justice and a remedy of wrongs arising from government's failure to govern. They further argued that Kenya should be futuristic in attitude and not be bogged down by the past because it would be difficult to establish the truth about wrongs committed many years ago.

How and when it should be set up

How

Most of the speakers advised that it should be set up by an Act of Parliament while others recommended its entrenchment in the Constitution. One speaker, however, advised that the parliamentary route might take a while and proposed that it be set up like most other commissions, by presidential decree.

One speaker proposed that the Commission should employ its own independent investigators as the police force is tainted with complicity in past injustices that shall be investigated by the commission.

When

Most participants felt it should be set up immediately the Task Force completes its work. A proposal was made to link the commission with the office of ombudsman proposed in the ongoing constitutional review process.

Membership of the commission

It should be made up of persons with good moral standing in society, drawn from all the key professions, including lawyers, clergy, and grassroots representatives, women, youth, people with disabilities and human rights activists.

Life of the commission

A few of the speakers suggested that it should be permanent in lifespan, while the others did not specifically prescribe how long the commission should remain alive.

Terms of reference

The list of target subjects to be investigated include:

- The Emergency era in Northern Kenya
- Police brutality and excesses – trigger-happy officers, torture in police custody, rape while in custody, corruption
- Judicial services – corruption, delay, cost, fairness, openness
- The prison service - brutality, inhuman treatment, congestion, unlawful sentences, unbecoming jail sentences, homosexuality among inmates, nutrition, among other evils. Kodiaga and King'ong'o prisons were singled out at the top of dreaded destinations in terms of detention
- Human rights abuses and economic crimes, including land grabbing and land rights in general
- Banditry and insecurity in northern Kenya and the role of the security forces
- Human and wildlife conflict
- Education rights and deprivation of livelihoods for marginalised communities like the Turkana
- Violation of women's rights – domestic violence, rape, early marriage, HIV/AIDS, representation in public offices among other issues of concern to women
- Atrocities committed by the provincial administration
- Slave trade and its impact on Kenya, and possibilities for reparations, as well as repatriation and settlement of descendants of slaves shipped abroad
- Welfare of squatters in various settlement schemes – a relic of colonialism.
- Oppressive laws
- Land grabbing and illegal allocations
- Land dispossession by foreigners
- Government-sponsored atrocities such as ethnic clashes
- The plight of freedom fighters
- Oppression of university students and lecturers during the Mwakenya days
- Political assassinations – from 1963 to 2002
- Economic saboteurs from 1963 to 2002, particularly in relation to collapsed public institutions, and the irregular allocations of municipal council lands to private individuals
- Detention without trial during both the Kenyatta and Moi eras
- Wrongful dismissal of public servants, and delays in handing over retrenchment benefits to retrenched civil servants, as well as review of the measly ceilings of such benefits

Authority and powers of the commission

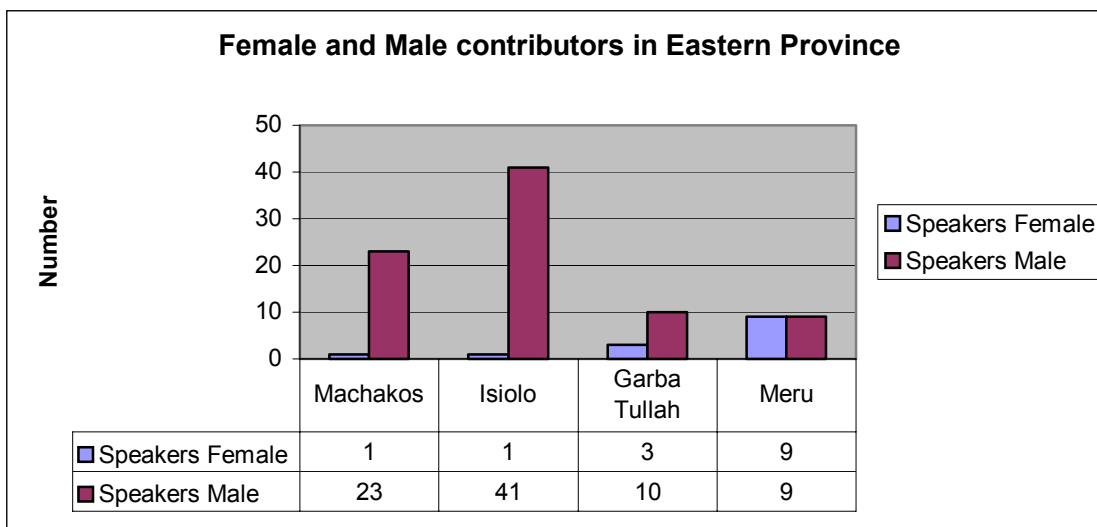
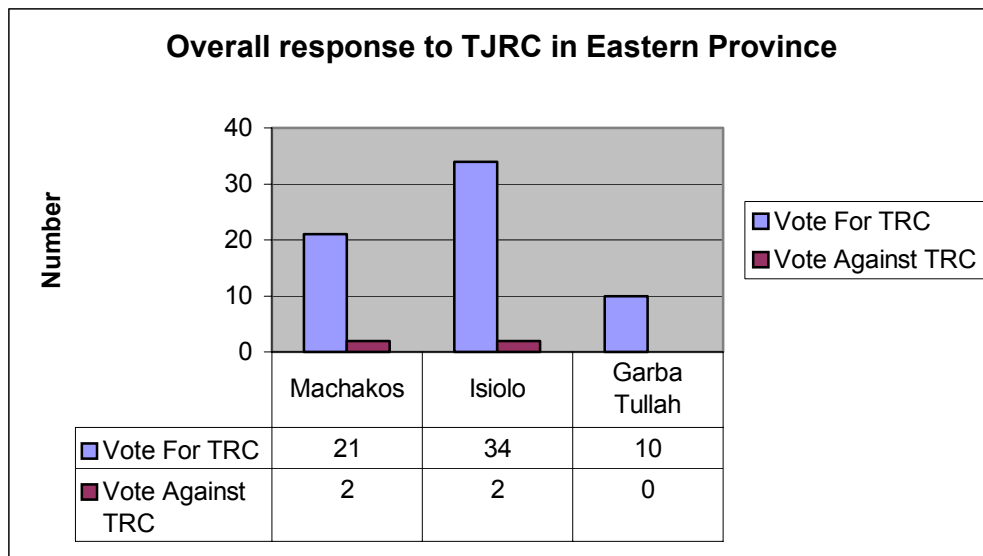
- Independence emanating from the act of parliament establishing it – powers similar to those enjoyed by the South African Commission; and if a Presidential commission, functional privileges and immunities accorded it under relevant laws;
- Power to summon anyone it deems necessary and useful for the investigations before it;
- Power to recommend prosecution, pardon, compensation and or restitution;
- Power to reconcile; pardon;
- Power to visit any place it may deem necessary in relation to proceedings before it;
- Power to access and peruse any document in whatever custody relevant to its investigations
- Authority to prosecute (opinion was divided)
- Authority to call back vital data stored outside the national borders in the national interest – for the reconstruction of national history, and reference was made to the Vatican (in relation to Meru generally) and to Westminster (in relation to the history of colonial rule in Kenya).

Historical period to be investigated

- *From the colonial period (1895) to date*, with a view to correcting wrongs committed against Kenyans up to the present time;
- *From 1952 to date* – to ensure it gets to the genesis of the Mau Mau problems, the injustices of the Kenyatta and Moi regimes, as well as the first year of the incumbent government;
- *From 1963* – because it was then that governance changed hands, from the white colonialist to the black Kenyan man, so that inquiries should focus on injustices perpetrated by Kenyans against Kenyans.
- *From 1978* – essentially in relation to the plunder of public institutions and the infamous phenomenon of ethnic clashes and land grabbing.
- *From 1939* – as a compromise to 1885 – to facilitate the re-writing of Kenya's history.
- *From 1945* – essentially for an audit of public lands within municipal councils in Meru, as well as for looking into the cases of Kenyans who fought alongside the allied forces in Burma and other battlegrounds during the second world war – as conscripts.

Statistics

Total no. of submissions - 74
Supporting commission - 74
Against commission - 0



List of contributors:

Meru

1. Geoffrey Githinji
2. Samuel Muchemi
3. Leonard Mureithi
4. Derrick Murioti
5. Jedia Karia
6. Francis Xarier Kiogora
7. John Gikunda Mugambi

8. Manyara Lemwei
9. Francis Mwongera

Isiolo

10. Mohammed Njiru
11. Bufukor Mr.
12. Abdullahi Mohammed Hassan
13. Hassan
14. Ahmed G.
15. (Anonymous)
16. Ambrose Muthaura
17. Khalif Abdi
18. David Wiria
19. Ahmed Juma Yusuf
20. Daudi Konso
21. Ahmesa Huyu
22. Adam Abdilla
23. Abker Mohammed
24. Abdi Mohammed
25. Abdullahi Dile
26. Mama Asalia Mohammed
27. Councillor Elijah P. Mugambi
28. Mr. Kiguna Francis
29. Cllr. Gesogoyo Nicholas
30. Representative from Kipsing
31. Hassan
32. Hassan
33. Joseph Song'alo
34. Joseph Ngitili
35. Hussein Hassan
36. Anonymous
37. Omar
38. Anonymous
39. Joseph Karabata
40. (Anonymous)
41. Johnson Ndari
42. Otieno
43. Saleh Hussein Mohammed
44. Abdi
45. (Anonymous)
46. Simba J.
47. (Anonymous)
48. (Anonymous)
49. Hussein

Machakos

50. Dunson Mutuku
51. Ahmed Omar
52. Johnson Nyamuma Makau
53. Benjamin Muli
54. John Mutiso
55. Christine Lokomoteti
56. Patrick Lumumba Kyongo
57. Patrick Matheka Makathi
58. Jonathan M Masiyaki
59. Mathews Kioko
60. Murungi Ndolo
61. John K Makumi
62. Harwin Mwendung
63. George Muindi
64. Simon Kituku
65. Martin Musyimi
66. Dennis Musembi Muli
67. Michael Kilonzo
68. Mwera Wambua
69. Musyoka Muindi
70. Francis Wata Kiilu
71. Mathew Musila
72. Pius Kimoni
73. Julisu Nzioki
74. Joshua Ndunda Mutua

2.8 NORTH EASTERN PROVINCE

The Task Force conducted three public hearings in North Eastern province and between 7-10 July, 2003, in Garissa town, Wajir town and Wagalla airstrip.

Members of the Task Force attending:

Prof. Makau wa Mutua - Chairman
Rev. Tomothy Njoya
Sheikh Ali Shee
Mr. Kibe Mungai
Bishop (Dr/Prof) Zablon Nthamburi
Hon. Dr. Amukowa Anangwe
Rev. Patrick Rukenya
Mr. Davinder Lamba
Ms. Zarina Patel
Dr. Josephine Ojiambo
Mr. Tirop Kitur
Ms. Mumina Konso

Secretariat :

Ms. Jennifer Miano
Mr. Ronoh Tuimising
Mr. George Gathi
Mr. James Waititu

OVERVIEW

North Eastern Province is regarded as the epicentre of human rights violations in Kenya. The province has experienced tremendous and continuous economic, political, social and religious upheaval that predates independence.

The residents generally welcomed the prospect of a truth commission to investigate atrocities committed in the region in the hope that it would get to the bottom of the issues faster than law courts ever would.

The residents of Garissa spoke more feelingly about the rest of Kenya, unlike in other parts of the Province, which considered northern Kenya districts not to be part of mainstream Kenya. Speakers observed that they are routinely subjected to discriminatory treatment but also demonstrated awareness of the afflictions of other parts of the country such as tribal clashes in the Rift Valley and Likoni in Mombasa, economic crimes and land distribution matters.

The Task Force, visited Wagalla airstrip, scene of the 1984 massacre, and visited several mass graves of Wagalla victims. It received recommendations from residents and survivors of Wagalla massacre. About 200 members of the public attended the hearings, the majority of whom were women and children. [It is said that arising from the 1984 massacre, the men folk have remained fewer than the women. Above the age of 40 years, there are distinctly more women than men, almost 7 to 1, and among the younger generation, the oldest men are about 26 – 27 years].

The participants were delighted that since the new government came in, they are able to visit the scene without being beaten up by the police. Before then, since 1984, they have not been allowed by the district administration to visit the site.

Most speakers traced their problems to the colonial time and therefore proposed that investigations from that time through the two post-independence governments headed by Kenyatta and Moi respectively.

FINDINGS

To set up or not to set up a truth Commission

The submissions returned an emphatic 'yes' for the establishment of a Truth commission. They suggested that even if the rest of Kenya did not need such a commission, North Eastern Province alone would justify its creation for the reasons set out under terms of reference below and because of the mass killings in the province.

They cited grave and sustained violations of human rights, some of genocidal proportions like the Wagalla Massacre, cruelty to animals, confiscation of private property without compensation, religious discrimination, oppressive laws, economic and political marginalisation as some of the reasons justifying the creation of a truth commission for Kenya.

Exposing and publicising these gross violations of human rights is important for posterity so that the country's shameful past may never be repeated against the people: massacres, colonial oppressions, killings and confiscation of livestock, torture of men including castration, human rights abuses, oppressive laws, and dumping of suspected radio-active material in the province.

Opposed

Two speakers held the view that Kenya does not need the proposed commission because it would be like spraying perfume on one's nose in order to avoid a bad smell. They went on to explain that Kenya needs real courts to dispense real justice because the Bench has been compromised.

There can be no amnesty for the perpetrators because doing so will institutionalise impunity for criminal conduct. Instead of amnesty, there should be reparations.

The truth is largely known and, for the most part, fairly well documented even if not currently in the public domain. They called for the declassification of dossiers on all the massacres and other injustices so that perpetrators can be prosecuted.

How and when the commission should be established

The majority of the residents favoured the commission being established by an Act of Parliament because of the significance of its mandate. A few suggested that beyond legislation, it should be entrenched in the constitution – to be included under a Schedule of Commissions.

Some expressed concern about a commission set up by an Act of Parliament, which several speakers did so recommend, because of the fear that a bill on the subject might be shot down by perpetrators who are now Members of Parliament. Such opponents proposed a Presidential commission. They also cautioned against a commission being used to witch-hunt other or that would not deliver like past commissions of inquiry.

Moreover, taking it to parliament would stretch and delay its establishment indefinitely due to the House procedures political manipulation and competing considerations in the House. Third, because the President has powers under the Constitution to create such a commission, the commission's mandate and authority would not be compromised in any way.

All were unanimous that the findings and work of the commission must be publicised and acted upon. They also recommended unanimously that once set up, the commission ought to have a secretariat stationed at Garissa to collect facts and evidence on injustices and violations of human rights. This, they explained, is because the ills they have lived through are legion, and short sittings will not do.

It was proposed that the commission exploits indigenous conflict resolution mechanisms in its reconciliatory role, and that it sets up conflict resolution centres all over the country.

Membership

The commission should have representatives from all provinces chaired by a Presidential appointee.

When it should be set up

The majority of the speakers recommended that the commission be set up immediately. The Task Force interpreted immediately to mean 'as soon as possible'. A few others recommended that it be set up after the conclusion of the on-going constitutional review process.

Terms of Reference

It was proposed that the commission conduct the following:

- State brutality through security agents – the Kenya Army and police – exemplified in massacres (particularly the burning of Garissa in 1980, Bura Irgu in July 1967, Bura Kartasi in 1980, Maalkam Ari, in Mandera, 1982, Bagala in 1998 - and other less reported but equally brutal and devastating executions)
- Torture – including the dropping of tortured persons to their deaths from helicopters,
- Rape of women and girls – including the forced impregnation of women and girls ('watoto wa Moi' phenomenon),
- Abduction of girls for immoral purposes
- Other killings/executions of persons, sponsorship of and prosecution of inter-clan warfare and tribal clashes
- Confiscation of civil property – notably livestock – by security personnel, oppressive laws (including the Closed Districts Act, Indemnity Act, and operation laws), the emergency period of 1964 –1967, the shifta and bandit flushing operations;
- Marginalisation of the Province by the government since independence in allocation of national resources for development: infrastructure, educational institutions, market development among other issues;
- Violations of women's rights other than those already referred to above;
- The October – November 1967 Peace Agreement between Kenya and Somalia: content, context, operation, impact on policy and administrative methods since 1967 – 2003;
- Specific provincial administrators during the time of the most heinous violations of human rights, and notably those in charge during the emergency years (1964 – 67), 1980 and 1998;
- Religious discrimination and victimization;
- Institutional and structural victimization;

- Open sale of sophisticated weapons and ammunition all over the province;
- Land grabbing;
- Cruelty to animals by security personnel and the Kenya Army: the mass shooting of livestock deliberately to impoverish the communities;
- Strictures on the use of River Tana: which is administratively under Coast Province, not North Eastern Province;
- Destruction of schools;
- Discrimination in the issuance of national identity cards and passports to Somalis (including the Somali Verification Programme);
- Dumping of toxic wastes in the province (especially on the reported cases of rising incidence of cancer of the oesophagus on residents of the suspect sites, and the increasingly poisonous waters around the sites that have killed livestock, as well as the increasingly visible environmental degradation around the suspect sites);
- Plight of original occupiers of land forcibly evacuated by the State's security agents;
- Abuse of office and power;
- Discriminatory treatment at Mwingi, Meru District, where Somalis are frisked by the police on suspicion of being 'shifta';
- Translocation of the Hirola, a wild animal traditionally resident in the Province, and an endangered species, to a private farm in Laikipia, in defiance of a court order;
- Government policy on Northern Frontier Districts and today's North Eastern Province and parts of Eastern Province since 1963.

Authority and powers of the commission

The recommended powers for such a commission were:

- Investigative powers
- Prosecutorial powers
- Compensation mandate
- Power to make reparations
- Power to recover grabbed property and restore it to the rightful owners
- Powers to order restitution of property

Specific submissions were also made on the following:

Compensation: a poor country with huge developmental needs like Kenya cannot afford to compensate all people for their loss. It might be possible to make token compensation to the countless victims if the colossal sums of money looted by perpetrators of economic crimes are recovered, but that it might be infinitely better to make compensation in other forms, such as enhancing access to basic services in the form of access to education, health, clean water, user-friendly roads, restoration of respect and humanity to the provincial administration, an end to all forms of discrimination, among many other humane deeds for the benefit of the residents of the province.

Reconciliation: is a non-factor before retributive justice is administered. They recommended that justice be done by way of prosecuting perpetrators of various atrocities and compensating them for property looted by security agencies before healing can follow.

Historical period to be investigated by commission

The residents were quite agreed that the social, economic and political evils that have befallen them started during the colonial days. However, they were divided on whether the commission should probe ills perpetrated against them by the British colonial government, or whether the probe period should be from

1963 when Kenya became an independent state. The arguments for either period were strong and passionate.

The general preference, however, leaned in favour of 1963 on the ground that to probe into the colonial past would be to open a can of worms that may not be concluded satisfactorily. Further, that the wrongs perpetrated by the independent Kenyan government, by Kenyan against Kenyan, is what causes much distress, and an evil that must be investigated and punished.

SITE VISITS - WAJIR

The Task Force visited the **Catholic Mission Graveyard** and the **Wagalla Airstrip** in relation to the Wagalla massacre of February 10 – 15 1984.

The purpose of the visits was to allow members of the Task Force to familiarise themselves with the enormity of the atrocities of February 10 – 15 1984 at Wagalla. At the sites, the members witnessed the legacy of a savage past, and Christian and Moslem prayers were said by the Reverend Timothy Njoya and Sheikh Ali Shee.

The Task Force members, in the company of the District Commissioner, his senior officers and a contingent of security personnel, visited Wagalla airstrip, the scene of the 1984 massacre of mainly members of the Degodia clan of the Somali community. The team also visited the Catholic Mission Graveyard at Wajir, the site of several mass graves of the victims of the massacre. Each grave holds approximately 75 bodies, the team was told.

It is estimated that 5000 men were rounded up and taken to Wagalla. Among the civil servants who were brought to Wagalla, only 2 survived the fire: a district officer and the then area chief. The residents of Wagalla could not verify the exact number of the dead but the Team was informed that the Wagalla incident has been documented before, and in that document statistics may be found.

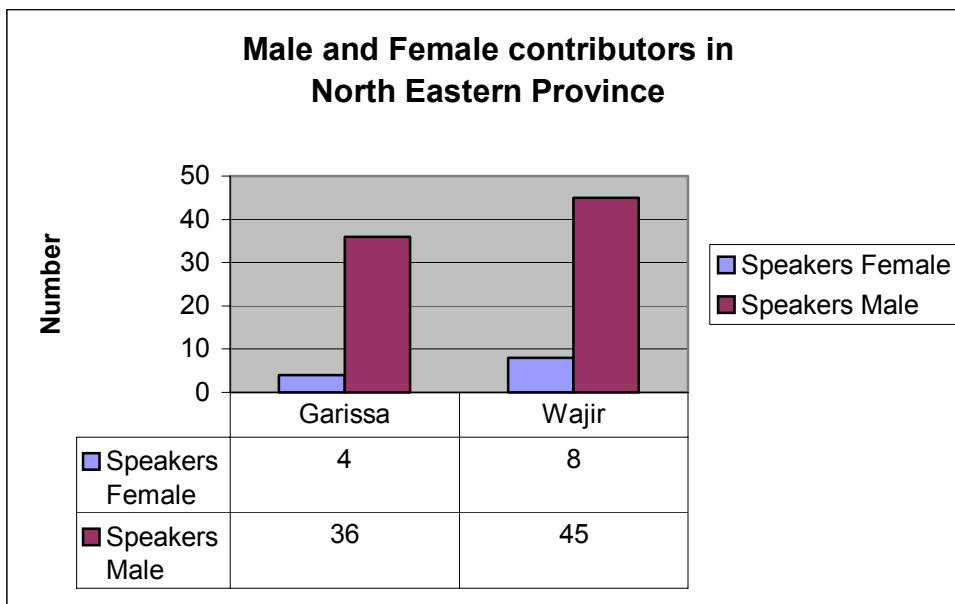
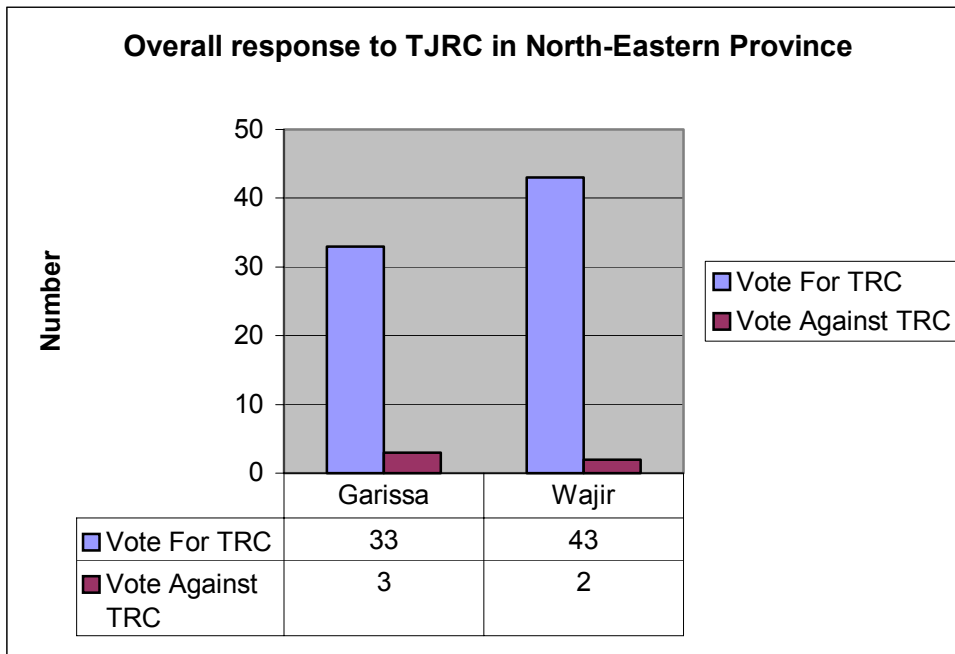
At the baraza conducted after the site visit to Wagalla airstrip, it was striking that there were more women than men. Several survivors undressed and prostrated themselves on the exact ground on which they lay reliving their horror and watch the massacre unfold. Most of the men who survived or witnessed the massacre are aged over 65 years on 9 July 2003 when the Task Force heard their testimonies.

It was the Task Force's impression that knowledge of the real cause of the massacre must lie with the civil servants in charge of the province at the material time led by the Provincial Commissioner, Mr. Benson Kaaria. Others who would be of assistance are the Wajir District Commissioner of the time, the OCPD Wajir and the Army Commander at the time.

Wagalla was a genocidal massacre. Survivors have the details of the unit commanders at the Wagalla airstrip on the fateful days, as well as those who picked them from their houses who would assist with investigate.

Statistics

No. of contributors	- 81
Supporting commission	- 76
Opposed to commission	- 5



List of contributors:

Garissa

1. Councillor Osman
2. Mr. Ahmed Muge R.

3. Hussein Waju
4. Osma Ibrahim Abdi
5. Hussein Mohammed Noor
6. Mrs. Zainabbu Mohammed
7. Shiadh Diho Abdi
8. Mohammed Ishmael
9. Rashid Ahmed Noor
10. Hussein Khure Mohammed
11. Mr. Ali Jubbat
12. Mohammed Dabba
13. Cllr. Maalim Ali
14. Ahmed Mohammed
15. Mama Adan
16. Mohammed Haji Daha
17. Ali
18. Ahmed Mohammed Abdi
19. Mohammed Kimagin
20. Ms. Abibah
21. Hassan
22. Hassan Sheikh Aali
23. Sheikh Hassan
24. Ms. Abibah
25. Abdulahai Daud
26. Hassan
27. Abdul
28. Rashid Mohammed
29. (Anonymous)
30. Ibrahim Omar
31. Abdi Mohammed
32. Mohammed Haji
33. Ahmed Ollat
34. Omar Ali
35. Hussein Hareth
36. Noor Mohamed

Wajir

37. Omar Haji Ibrahim
38. Mohammed Noor Ali
39. Ahmed (Ex councilor)
40. Mohammud Mohammed Ahmed
41. Abdi mohammed Hassan
42. Yusuf Maalim
43. Ibrahim Issa
44. Mohammed Sheikh Abdi
45. Abdi Ibrahim
46. Mohammud Mohammed (MP)
47. Mama Hussein Roble
48. Ms Amina Ahmed
49. Ms Halima Mohammed
50. Counc. Noor Ahmed Hajji

51. Bilal Saed Ali
52. Yussuf Muhammad Abdi
53. Hon Khalif Mohammed (MP)
54. Abbas Maalim Abdullahi
55. Mr Sheikh (Inter religious committee)
56. Abdulahi Abdille Samachal
57. Hussein
58. Ms Rupia Yerrow
59. Ms Elama Abdulahi
60. Adan Hussein Noor
61. Hussein Adan Omar
62. Ms Orai Allan
63. Mohammed Kirti
64. Ahmed Jele
65. Omar Aden
66. Osmal Abdille
67. Ms Zeinad Ibrahim
68. Ms. Khadija Aden
69. Sugow Hussein Mohamed
70. Mahat Ahmed
71. Abuludak Hussein Amed
72. Isha Ibrahim Hassan
73. Mohammed Sale Shah
74. Ahmed Maalim Ali
75. Siad Dakat Ibrahim
76. Noor Abdi
77. Ms. Suni Abdi
78. Salem Mukhtar
79. Kanyere Mohammed Yusuf

ANNEX 3. REPORT OF THE NATIONAL CONFERENCE

SUMMARY OF DELIBERATIONS OF THE NATIONAL CONFERENCE ON THE ESTABLISHMENT OF JUSTICE AND TRUTH COMMISSION

OVERVIEW

The Conference was held on 4-5 July 2003 at the Intercontinental Hotel, Nairobi. Justice and Constitutional Affairs minister, Hon. Kiraitu Murungi, opened the conference which was attended by senior government officials including his assistant minister, Hon. Robinson Githae, and Permanent Secretary, Jeremiah Matigaro. Assistant Minister of State in the Office of the President, Hon. Kivutha Kibwana, also attended as did all members of the Task Force.

The conference was called to facilitate a national dialogue on the necessity of a truth, justice and reconciliation commission for Kenya. At the end of the conference, delegates passed a declaration to the effect that:

1. The Government of Kenya immediately establishes a Truth, Justice and Reconciliation Commission to address both gross human rights violations and economic crimes committed in Kenya between 1963 and 2002;
2. The Commission be empowered to recommend restitution, reparations, prosecutions and conditional amnesties;
3. The commission should be independent, effective and broad-based in membership;
4. The Commission must not be a witchhunt or a white wash instrument; and
5. The commission should address grave injustices related to land.

The conference was unanimous that the country had been wounded by the atrocities of the past and a mechanism to find out the truth, mete out justice to victims and bring about national healing was necessary. Various concerns were raised with the government:

1. Government commitment

Delegates were concerned about the government's commitment to change and questioned the belief that the NARC administration was actually ready to preside over change and therefore committed to a truth, justice and reconciliation process. Some participants said that the government had yet to prove that it is reformist and not engaged in business as usual. The real test, it was pointed out, was the way the government held people accountable for the past and the success of its war against corruption.

Both the minister and assistant minister for justice and constitutional affairs assured delegates that the government was deeply committed to the exercise and would be faithful to the wishes of Kenyans as will be expressed in the task force report. The minister assured the delegates and Kenyans in general that the quest to address the past is not a pretext to witchhunt, hound or persecute certain individuals and communities.

2. Clemency and Accountability

There was concern about pardoning gross human rights violations. Participants felt that cuprits ought to be held to account by being prosecuted or punished. It was pointed out that it was generally against international law, to which Kenya is obliged to comply, to forgive gross human rights violations even when carried out under lawful immunity.

3. Duplication

There was further concern about the duplication of efforts in dealing with Kenya's dark past. It was noted that the government had already established the Goldenberg Inquiry as well the Parliamentary Select Committee to pobe the death of the former foreign affairs minister, Dr. Robert Ouko. It was pointed out that the government needed to be seen to have a coordinated approach in dealing with the past.

FINDINGS

To set up or not to set up the commission

The conference supported the establishment of the commission to facilitate a process through which the nation's collective soul could be healed. The commission would capture the broader picture than prosecuting human rights violators would. The genesis of such abusive acts would be understood and dealt with for posterity. Such a process would inculcate a culture of human rights in government and enhance respect for the rule of law. The commission will help the country come to terms with its past and help build the future.

A commission process would take not only legal but also moral responsibility for remedying the Kenyan society and preparing the public to accept responisbility for their acts while the State would atone to its people for abusing the power and trust bestowed upon it by the constitution.

The commission was said to be necessary because Kenyans doubted the capacity of the Kenyan judiciary to deal with the past. It was argued that the Judiciary was heavily implicated in the repression of Kenyans and it still needs further refinement to be able to deal with such an enormous assignment. It was further feared that now that some members of the judiciary must be working to ensure their survival under the NARC administration, they might be tempted to convict alleged perpetrators even without proper legal basis. This danger is as real and as dangerous as the previous practice of letting known and notorious abusers of human rights and public office scot free during the KANU reign.

Opposed

There were three very articulate submissions against the establishment of the commission. The speakers felt that the country did not need to investigate the truth because it was already know. Nor was there need to reconcile anybody. Kenyans needed justice. They were not opposed to

reconciliation being a by-product of justice but vehemently opposed forgiving perpetrators. They wanted alleged perpetrators taken to court, tried and if convicted, duly punished.

Speakers expressed the need for the commission to be qualitatively different from other commissions that have been established before, which were good at documentation but achieved little. It was proposed that the commission should also use reports of previous commissions such as the Akiwumi Report on Land Clashes.

It was noted that in the absence of a negotiated political settlement in Kenya like in other jurisdictions which guarantee their success, the Kenyan commission would solely depend on the government's commitment and political will to support the work of the Commission.

It was stressed that Kenyans must get some form of justice for there to be true national healing and reconciliation. For instance, it was said, those that stole public property should return it as a super minimum precondition for forgiveness.

When the Commission should be set up

The government was urged to set up the commission immediately. Speakers warned against delaying the establishment of the commission noting that the longer it took the government to set the commission, the more time and space the government gave to perpetrators to strategically reposition and reinvent themselves thus making it more difficult to hold them accountable for their misdeeds. This strategic repositioning had to be stopped for the further reason that such persons were able to subvert the new order.

Powers, Privileges and Limitations

The Commission should have power to summon witnesses, to restore stolen property, order restitution and compensation, grant amnesty, recommend lustration and demand that perpetrators apologize to victims.

Terms of Reference for the Commission

The conference recommended that the commission be focused in its work. Lack of focus might lead to a situation where the commission investigates everything and nothing.

The commission should investigate gross human rights violations, economic crimes and grave injustices related to land. The country has seen very dark days when citizens were tortured, detained without trial or even killed because they did not politically agree with officialdom or wanted restoration of democracy, good governance, respect for fundamental rights, freedoms and the rule of law, which officialdom regarded as treason.

One presenter argued that the commission should only focus on gross human rights violations and leave out economic crimes. The government should establish other mechanisms for addressing economic crimes like it has already done under the Goldenberg Inquiry. Combining both economic crimes and gross human rights violations would make the commission's work endless, become a ploy to delay justice and defeat the purpose of a truth commission. A truth commission should, ideally, finish its work in less than three years.

The majority, however, felt that the commission should address both gross human rights violations and economic crimes because there is a very thin line between them. Other proposed duties of the commission included:

- political assassinations, massacres and police killings, land clashes of 1991-1992 and 1997-1998, corruption, land grabbing and other historical claims relating to land.
- reports of previous inquiries to avoid duplication
- educating the public on matters of rights, remedies and the work of the commission so that those that would choose to forgive should do so with a clear understanding of their rights
- mandate to order restitution and compensation for the victims. Victims will feel sacrificed if they do not get some form of acknowledgement and recognition.
- establish personal and state responsibility for certain past crimes. The commission should establish and document the policy object behind the crimes. It is important to go for the sponsors and key pillars of the crimes since going after every small perpetrator would tie down the commission in detail
- the task force was urged to clearly think through the question of amnesty and whether the president could exercise the power of clemency for some people and for certain crimes. The question of amnesties was seen as one of the incentives that would be given to the "soldiers" who would be useful in producing evidence linking the crime to the "commanders." Those that refuse amnesty should be prosecuted.
- The commission should be able to offer counseling to victims who had been greatly hurt and traumatized.

The commission must protect both victims and perpetrators.

Membership of the commission

The membership of the commission should be broad without compromising competence and integrity which are core to legitimacy that is absolutely critical to the success of the commission.

The commission should comprise doctors because of questions of torture, lawyers, psychologists, a representative of the Lands Office, police, judiciary and religious groups.

Historical period to be investigated

The commission should investigate all human rights violations from 1963.

A few people, and notably the keynote speaker, wanted these investigations to be done from 1895. Colonial rule was seen as having sown the seeds of oppression and the culture of impunity. One person said that the commission should investigate from 1990 to 2003 because the expansion of the democratic space put every public official on notice that certain acts were illegal, unconstitutional and outrageous to Kenya's public morality. They should therefore be held to account.

DECLARATION OF THE NATIONAL CONFERENCE ON THE ESTABLISHMENT OF A TRUTH, JUSTICE AND RECONCILIATION COMMISSION HELD ON THE 4-5, JULY, 2003 IN NAIROBI

We, the participants at the National Conference on the establishment of a Truth, Justice and Reconciliation Commission assembled in Nairobi on July 5, 2003,

Responding to the national and historical call of our people to justice,

Mindful of our national duty to foster peace and democracy,

Committed to the enormous task of national reconciliation and healing,

Driven by deep faith in a just society based on a culture of constitutionalism and the rule of law,

Affirming the need to confront our past that has a history of gross human rights violations and economic crimes,

Acknowledging limitations and inadequacies of our legal system in addressing gross human rights violations and economic crimes

Do now resolve:

1. That the Government of Kenya immediately sets up a Truth, Justice and Reconciliation Commission to address gross human rights violations and economic crimes committed in Kenya from 1963-2002.
2. That the Commission shall have the powers to address and recommend restitution, reparations, prosecutions and, in special circumstances, conditional amnesties as well as mechanisms and policies for preventing and addressing future violations.
3. That the Commission should be independent, broad-based and composed of persons of high moral integrity.

4. That the Commission shall not be used as a witchhunt, white wash or as an instrument to delay justice.
5. That the Commission shall have the mandate to address gross human rights violations, gross economic crimes and grave injustices related to land.
6. That the Commission shall pay special attention to the atrocities committed in the Northern Frontier Districts.

List of speakers

Mr. James Orengo
Hon. Kivutha Kibwana
Mr. Pheroze Nowrojee
Dr. Karuti Kanyinga
Mr. Nzamba Kitonga
Dr. Gibson Kamau Kuria
Ms. Betty Murungi
Ms. Nancy Baraza
Mr. Abdulmarni Wandati
Ms. Lynn Muthoni Wanyeki
Justice Torgbor
Bishop Horace Etemesi
Kisemei wa Mutistya
Prof. Gilbert Ogutu
Mr. PLO Lumumba
Mr. Ahmed Nassir
Mr. John Munuve

ANNEX 4. REPORT OF THE INTERNATIONAL CONFERENCE

Introduction

The international conference was held on 14-16 August 2003 at Safari Park Hotel. It was addressed by Archbishop Desmond Tutu who chaired the South African Truth and Reconciliation Commission, Justice and Constitutional Affairs minister Hon. Kiraitu Murungi, Assistant Minister Hon. Robinson Githae and Office of the President Assistant minister Hon. Kivutha Kibwana beside other political and academic luminaries.

The conference was attended by all members of the Task Force (some intermittently) except Dr Amukowa Anangwe.

SUMMARY OF PROCEEDINGS

The Importance of a Truth, Justice and Reconciliation Process

Participants noted the importance of societies emerging from repressive periods of their national history to confront their past in a way that enables them to grieve and heal wounds and look into the future with confidence. The options available to such nations include the Nuremberg route, whose core principle is trials and administering due punishment; blanket amnesties where those who belong to the ancient regime are forgiven for all their misdeeds without an inquiry; and truth commissions.

The Nuremberg route is fraught with many dangers. There are questions of a polarized judicial system that embodies the polarisation of society at that time in history compounded by the capacity of the judicial system to cope with an avalanche of new prosecutions targeting perpetrators and members of a former repressive government. Politically, trials get complicated especially where, like in the case of Kenya, the former government is defeated through an electoral process but not vanquished. Members of the former regime that still hold on to their constituencies and could occupy key and strategic government positions in the short and medium term, which poses a potential threat to political stability.

It was further observed that in the interest of breaking the vicious circle of hatred, vindictiveness and violence so as to achieve national harmony, it is important to negotiate the way forward for a country emerging from a traumatic past. Trying perpetrators is not always an easy option. Nuremberg was made easy by the fact that the victors did not have to share a homeland with the vanquished. Even then, the Germans carry a deep resentment and hurt to date as the after-effects of Nuremberg. Most countries are often unlucky to have tormentors, oppressors and abusers co-exist.

The option of blanket amnesties is morally repugnant. It signals the sanctification the culture of impunity in a dangerous form that leaves society insecure in the knowledge that what they experienced before could recur.

Though it would be naive to say that the truth commission process is perfect, it gives a country the opportunity to craft a vehicle for addressing its past that is best suited to its experiences. The delicate political situation that countries undergoing transition from a dark past often find themselves in and the complexities that attend such transitions demand that every truth commission process must take into account local circumstances. The future of the nation must underscore all efforts to investigate the past. Efforts that would jeopardize that future are best avoided.

Truth commissions and political transitions

The place of a truth commission in a political transition from a dark past is not hard to see. Dictatorships leave behind highly fragmented societies in urgent need of national healing, harmony and unity. The process of looking at the past must be one which helps debunk the myths that helped perpetuate the dictatorship by establishing historical truth, restoring the dignity of the people through some measure of justice availed to the victims and country in general and work towards national unity and reconciliation. This process must of necessity not undermine the forward-looking direction of change by exacerbating national divisions and conflicts or pursuing methods that signal a slip back to authoritarianism.

A troubling aspect of the Kenyan scenario is the fact that some senior officials in the current administration were key actors in the former government. Some are suspected perpetrators. This scenario is not unique to the Kenyan experience. The difficulty with this scenario is that government support and commitment to such a process may not be forthcoming because actors in the government foresee themselves as casualties of such a process. The question is one of securing government support, material and political, for the truth commission. The answer to this difficulty can only be found in the unequivocal expression of the Kenyan people of their need to have an effective truth commission. This must start with the leadership and great contribution from organized civil society in a project that is necessarily political, putting the nation in a mode that makes it difficult for anyone, no matter how powerful, to obstruct the process without adversely affecting their standing in society.

Prerequisites for a commission

It is important that before a commission is set up that those charged with the responsibility of setting it up think through the consequences and likely outcomes of such a process. Though it is not possible to foresee all the outcomes and consequences of such a process, it is possible to foresee important outcomes and possible scenarios that would be the consequences of the commission's work. This is important since it helps the country focus on wanted results. The kind of commission the country comes up with after prospective thinking on outcomes and consequences has a higher probability of delivering the wanted results.

It is equally important to engage in wide consultations with stakeholders after the task force submits its report before the commission is set up. This presents an opportunity for people to respond to the task force report. Such a process will generate a strong sense of ownership of the process among the Kenyan people. This is very crucial for the success of the commission.

It is also important to prepare the country, victims and perpetrators for a truth commission process through civic education, continuous consultations with civil society and other actors. It was noted in this regard that civil society has proved invaluable in countries that have undertaken similar national exercises.

Commission operations and process

It is important that on the whole, the proceedings of the commission be in public. This is a necessary departure from the culture of secrecy that characterized the years of oppressive rule. It is however recognized that special categories like the testimony of women be held in closed doors, requests for which may be granted.

In addition to holding public hearings, it is important to hold institutional hearings in which process institutions that have been indicted for human rights violations like the police, the judiciary and intelligence service can account for their past (mis)conduct.

It was pointed out that truth-finding involves ascribing responsibility and the commission must not shy away from doing so. It also includes individualizing responsibility and exposing those that hide behind collectives and institutions such as communities and government organs.

The task of report writing should start at the beginning of the commission's work. The experience of other commissions is that if report writing waits till the commission is in its winding up phase, it becomes very difficult to write a report that does not lose a lot of significant information. It is important to capture a lot of the process and procedure in the report because it is in itself a very strong educational and political tool.

Victims should receive V.I.P treatment during commission proceedings.

Composition of the commission

The membership of the commission goes to the core of its legitimacy. The process of choosing commissioners also presents an opportunity to anchor post commission follow up processes that would generally continue its work into the future. In this respect, key organizations such as the Kenya National Commission on Human Rights should be ex-officio members of the commission. This would secure continuity once the commission has wound up. The Kenya National Commission on Human Rights would carry forward with the commission's work especially with regard to issues of redress and work to guarantee non-recurrence of human rights violations.

The commissioners should be appointed after wide consultations with civil society and other stakeholders. Only persons of integrity and competence should be appointed.

Powers and structures of the commission

The commission should be given adequate powers to effect its mandate. The structures and powers should match the job at hand. It is important for the commission to have the power of subpoena. Experience elsewhere shows that if the commission does not have power to compel people to appear before it they will subject it to ridicule and attempt to scuttle its work.

The power to recommend or offer amnesties should be exercised judiciously. Experience in other jurisdictions shows that offering amnesties alone does not of itself guarantee full disclosure and honest confessions about the role of certain actors in past abuses. For amnesty to be effective as an inducement for full disclosure there must be a real and felt threat of prosecutions.

The Commission's mandate

The mandate of the commission should be precise if it is deliver results. The conference did not exhaustively discuss the question of economic crimes in a truth commission, which needs further discussion. However, there was consensus that those that plundered the national economy must account. The issue is one of route or vehicle as opposed to whether or not these should be investigated.

Though it is very important for the commission to do its best to promote national reconciliation and unity, it must be careful not to be trapped into the role of mediators. If this happened, it would take a lot of the commission's time and resources away from its more critical job: truth finding. It is therefore important in this respect for the commission to partner with civil society and religious bodies that would comfortably shoulder this responsibility.

Who is a victim?

For certain violations and abuses of power the victim class is more diffuse. In this context, the term evokes such acts as corruption, violations of press freedom, infringement of the twin freedoms of assembly and association, restrictions on free movement and expression. Though the victim class is diffuse, these acts are no less destructive of society. They involve collective hurt and therefore require national healing.

In other situations the victims are known individuals, their relatives and communities. Even when the hurt can be individualized, the nation still hurts from the violations of individual citizens in the same manner that the whole human body suffers when a part is sick or injured.

Access by women and children

It was observed that across the world it has been reported that it has been difficult for women and children to access truth commission processes in a meaningful way. Where women do indeed participate, they merely go through the motions and may not express their hurt. They will most probably talk about the suffering of their loved ones but not themselves. Truth commissions work in cultures that muffle women's voices most of the time and may, if not conscious of this limitation, alienate women from their processes.

The truth commission should therefore go out of its way to design procedures and methods that make sure that women are heard. A good example is the Sierra Leone Truth Commission, which decided to hold thematic hearings. The suffering of women was one of these special themes and only women commissioners participated in its sittings. As a result, it has been reported that women were more forthcoming with their stories of hurt and pain than in processes where this was not done.

Post-commission follow-up processes

The truth commission process is never the end. It is important therefore for the commission to think about post-commission processes that would complete what it started. This could be carried in the recommendations that it makes in its report.

It is important in this regard for the commission to draw a comprehensive reparations policy for implementation by government amongst other recommendations. Further, the commission should make recommendations for the reform of the state to guarantee non-repetition of past abuses. Such reforms could include legal reform and the establishment of such institutions as the office of the ombudsperson for future protection of citizens.

The government should also be required to give full and meaningful consideration to the recommendations.

List of speakers and panelists

Archbishop Desmond Tutu (Inaugural Address)
Prof. Ali Mazrui (Keynote Address)
Prof. Henry Steiner
Prof. Makau Mutua
Ms. Betty Murungi
Dr. Janet Kabeberi
Prof. Peter Rosenblum
Justice Albie Sachs
Dr. Alex Boraine
Hon. Kivutha Kibwana
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Mr. Davinder Lamba

Vote of thanks

Dr. Rev. Timothy Njoya
Prof. Makau Mutua
Dr. Willy Mutunga

ANNEX 5. ANNOTATED BIBLIOGRAPHY¹

A. Scholarly and specialized journals

1. **Abrams Elliot, "Truth without Justice?" *Policy Review*, February 2001**

Abrams examines the question of how the past is dealt with: trial and prosecution or amnesty. He uses the South African Truth and Reconciliation Commission as a point of reference and asks if indeed it served the ends of justice or merely subordinated them to truth-telling, historical reconstruction and reconciliation.

2. **Ackerman Alice, "Reconciliation as a Peace-Building Process in Post-war Europe: The Franco-German Case," *Peace and Change*, 19(3), July 1994**

This article examines the theoretical, empirical and policy dimensions of the process of reconciliation and examines the case of post-war West Germany in this regard. There is the recognition of the fact that the process of reconciliation needs to incorporate the creation of durable structures that, though not eliminating the conflicts of interest, provide a platform to eliminate the basis of war.

3. **Andrews Molly, "The Politics of Forgiveness," *International Journal of Politics, Culture & Society*, 13(1), Fall 1999**

This article examines how effective the East German Truth and Reconciliation Commission was in bringing justice to the victims and encouraging reconciliation. It raises questions on the aims, meaning and acceptance of forgiveness.

4. **Battle Michael, "A Theology of Community: The Ubuntu Theology of Desmond Tutu," *Interpretation*, 54(2), April 2000**

Battle considers the vital theological and political contributions on forgiveness and repentance of Archbishop Desmond Tutu as key to the future of South Africa.

5. **Cardenal Rodolfo, "The Collapse of the Salvadoran State," *Journal of Third World Studies*, 11(1), Spring 1994**

This article examines the findings of the El Salvador Truth Commission and finds its most important contribution to be the structural reform of the state to ensure civilian control over all security forces.

6. **Christodoulidis, E.A., "Truth and Reconciliation as Risks," *Social & Legal Studies*, 9(2), June 2000**

This article examines the dichotomy of the South African Truth and Reconciliation Commission as both a truth-seeking and amnesty-granting body and how this impacted on reconciliation.

7. **De Ridder Trudy, "The Trauma of Testifying," *Track Two*, 6 (3&4), December 1997**

This article examines the psychological impact of those undergoing the truth and reconciliation process and calls for greater support to them.

8. **Ensalaco Mark, "Truth Commissions for Chile and El Salvador: A Report and Assessment,"** *Human Rights Quarterly*, 16(4), November 1994

Ensalaco assesses and compares the Chilean and Salvadoran truth commissions and recommends the use of truth commissions to restore human rights and justice.

9. **Galtung Johan, "After Violence: 3R-Reconstruction, Reconciliation, Resolution: Coping with Visible and Invisible Effects of War and Violence,"** n.d., <http://www.transcend.org/TRRECBAS.HTM>

This article highlights the inter-dependence of Reconstruction, Reconciliation and Resolution in post-conflict scenarios arguing that to omit one will undermine the achievement of the other two.

10. **Gobodo-Madikizela Pumla, "Healing the Racial Divide? Personal Reflections on the Truth and Reconciliation Commission,"** *South African Journal of Psychology*, 27(4), December 1997

Gobodo-Madikizela looks at the public significance of the South African Truth and Reconciliation Commission as well as some of the normative challenges it faced.

11. **Goodman David, "Why killers Should Go Free: Lessons from South Africa,"** *The Washington Quarterly*, 22(2), Spring 1999

This article re-examines some of the criticism heaped against South Africa's Truth and Reconciliation Commission in light of its relative successes at getting to the truth and beginning a healing process.

12. **Hanh Thich Nhat, "Seven Steps to Reconciliation,"** *Fellowship*, July August 1987

This is about how to arrive at reconciliation, Buddhist style. This religious process has been in use for over 2,500 years in places such as India, China, Vietnam, Japan and Korea.

13. **Hayner, Priscilla B., "Reflections on the Sierra Leone Truth and Reconciliation Commission,** July 19, 1999. <http://www.article19.org/docimages/728.htm>

Hayner offers a short and practical guide on how to form a Truth and Reconciliation Commission with a view to informing the discussion in Sierra Leone on truth commissions.

14. **Hayner, Priscilla B, "Truth Commissions: Exhuming the Past,"** *NACLA Report on the Americas*, 32(2), September-October, 1998

This is a brief comparative study of the Chilean, Guatemalan and Salvadoran truth commissions that examines their relative strengths and weaknesses.

15. **Hayner, Priscilla B, "International Guidelines for the Creation and Operation of Truth Commissions: A Preliminary Proposal,"** *Law and Contemporary Problems*, Vol. 59(4), Autumn 1996

This article offers a discussion on how to create and operate truth commissions by questioning the theoretical and normative underpinnings of the UN guidelines on the same.

16. Hayner, Priscilla B, "Fifteen Truth Commissions – 1974 to 1994: A Comparative Study," *Human Rights Quarterly*, November 1994

Hayner provides an overview on 15 truth commissions formed between 1974 and 1994 and examines their importance.

17. Henderson Willie, "Metaphors, Narratives and 'Truth': South Africa's Truth and Reconciliation Commission," *African Affairs*, 99 (396)

This article examines the justifications and criticisms of the South African Truth and Reconciliation Commission.

18. Hope Donald, "The Healing Paradox of Forgiveness," *Psychotherapy*, 24, 1987

This article examines the therapeutic nature of forgiveness despite its paradoxical nature.

19. Ignatieff Michael, "Articles of Faith," *Index on Censorship*, 5 (96), September 1996

Ignatieff examines the concept of truth in truth commissions and asks questions about its reconciliatory effect arguing that this latter aim could be better achieved through public ritual atonement.

20. Jeffrey Anthea, "The Truth about Truth Commissions," *Human Rights*, 27(2), Spring 2000

This article looks at how effective the South African Truth and Reconciliation Commission was really.

21. Kaye Michael, "The Role of Truth Commissions in the Search for Justice, Reconciliation and Democratization: The Salvadoran and Honduran Cases," *Journal of Latin American Studies*, 29, October 1997

The article examines the Honduran and Salvadoran truth commissions and their positive impact in promoting reconciliation and democratic reforms and change in both countries.

22. Landman Stephan, "Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions," *Law and Contemporary Problems*, 59(4), Autumn 1996

This article examines how effective Truth Commissions are in dealing with past human rights abuses and recommends that they should only be used when nationally desired, should offer reparations and not be used as a whitewash.

23. Lerche, Charles O. III., "Truth Commissions and National Reconciliation: Some Reflections on Theory and Practice," *Peace and Conflict Studies*, 7(1), May 2000

Lerche offers an overview on truth commissions and compares and contrasts those in South Africa, Guatemala, Chile and Argentina. He also looks at some contentious normative dichotomies facing truth commissions.

24. Little David, "A Different Kind of Justice: Dealing with Human Rights Violations in Transitional Societies," *Ethics & International Affairs*, 13, 1999

In distinguishing between retributive and restorative justice, this article looks at how the broadened concept of justice has been applied in South Africa and Bosnia Herzegovina.

25. Mendez Juan E., "Accountability for Past Abuses," *Human Rights Quarterly*, 19, May 1997

Mendez assesses the need for states to fulfill the obligations on truth and justice and argues that these are not mutually exclusive. He supports the drive by the international community to ensure that there is accountability in states following gross human rights violations.

26. Minow Martha, *Between Vengeance and Forgiveness: South Africa's Truth and Reconciliation Commission*," *Negotiation Journal*, 14(4), October 1998

This article deals with the conflicting issues and challenges confronting the South African Truth and Reconciliation Commission.

27. *NACLA Report on the Americas*, "Unearthing Memory: The Present Struggle over the Past," 32(2), September/October, 1998

This report looks at Latin America's struggle with its past and the role of truth commissions in this endeavour.

28. *NACLA Report on the Americas*, "Time for a U.S. Truth Commission," 32(6), May/June 1999

This article calls for the investigation and official acknowledgement of US involvement in the numerous dirty wars and murders that occurred in Latin America.

29. Natrass Nicoli, *The Truth and Reconciliation Commission on Business and Apartheid: A Critical Evaluation*, *African Affairs*, 98(392), July 1999

Natrass highlights the move by the South African Truth and Reconciliation Commission to examine the role of business in perpetuating apartheid and asserts that this normatively expands the parameters of the examination of past abuses from mere individuals acting with political motives.

30. Odendaal Andries, "For All Its Flaws: The TRC as a Peacebuilding Tool," *Track Two*, 6(3&4), December 1997

This article examines the challenges of the truth and reconciliation process and focuses on the lessons that can be drawn from it.

31. Penwill Richard, "Not a Legal Concept," *Track Two*, 6(3&4), December 1997

Penwill looks at how the Truth and Reconciliation Commission expands on the justice dispensed by courts.

32. Popkin Margaret and Naomi Roht-Arriaza, "Truth as Justice: Investigatory Commissions in Latin America," *Law & Social Inquiry*, 20(1), Winter 1995

This article dissects the efforts of truth commissions in Latin America to achieve their goals; it also measures the relative successes and failures of these efforts and argues that truth commissions could lead to injustice if they simply substitute judicial action.

33. Rolston Bill, "Turning the Page Without Closing the Book," *Index on Censorship*, 25(5), September-October, 1996

This article argues that Northern Ireland is not ready for a truth commission and, given the local distrust for a state-sponsored truth commission, calls for the use of non-official mechanisms to systematically document human rights abuses.

34. Rosenberg Tina, "Overcoming the Legacies of Dictatorship," *Foreign Affairs*, 74, May/June 1995

This article examines the choices states have during democratic transitions and looks at how the nations in Latin America and Eastern Europe have confronted their pasts.

35. Ross Fiona, "Blood Feuds and Childbirth: The TRC as Ritual," *Track Two*, 6(3&4), December 1997

This article looks at the capacity for conflict resolution of South Africa's attempt to create a shared past through the Truth and Reconciliation Commission.

36. Ruden Sarah, "Harsh Politics, Extravagant Forgiveness," *Christian Century*, July 2000

This article critically appraises the failings of the South African Truth and Reconciliation Commission.

37. Skaar Elin, "Truth Commissions, Trials – or Nothing? Policy Options in Democratic Transitions," *Third World Quarterly*, 20(6), December 1999

Skaar co-relates the choice of the transitional justice mechanism to be used by a state to the subsisting political environment therein, especially the relative political/military strength of an outgoing autocracy.

38. Sooka Yasmin, "TRC South Africa: The Role of Civil Society in Dealing with Past and Present Conflicts," n.d., <http://infid.ngonet.be/baliconfpaperyasminsooka.html>

Sooka gives a historical background as well as an inside look at the South African Truth and Reconciliation Commission, examining the role of civil society in this process as well as outlining the handicap of the Commission's limitations, especially its inability to examine the social-economic implications of apartheid.

39. Thloloe Joe, "Showing Faces, Hearing Voices, Tugging at Emotions: Televising the Truth and Reconciliation Commission," *Nieman Reports*, Cambridge, MA, Harvard University, 52(4), Winter 1998

This article underlines the instrumentality of the media in facilitating reconciliation during the truth and reconciliation process.

40. Van der Merwe, Hugo and Polly Dewhirst, "Non-Governmental Organizations and the Truth and Reconciliation Commission: An Impact Assessment," *Politikon, South African Journal of Political Studies*, 26, May 1999

This article examines the impact of NGOs on the whole process of truth and reconciliation in South Africa right from before the formation of the Truth and Reconciliation Commission. It also discusses the impediments to the efficacy of this relationship.

- 41. Van Zyl Paul, "Justice in Practice – Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission," *Journal of International Affairs*, 52(2)**

Van Zyl assesses the causes behind the creation of truth commissions and explores different facets of the South African Truth and Reconciliation Commission, looking at how and why it positively impacted on the country. It explains the role of a truth commission in broadening the international discourse on transitional justice.

- 42. Walsh Brian, "Resolving the Human Rights Violations of a Previous Regime," *World Affairs*, 158, Winter 1996**

Walsh examines the reasons why governments elect different policy options in dealing with previous human rights violations and establishes the different aims that they seek to fulfil. He also examines the case of Rwanda in this regard.

- 43. Wilson Richard A., "Reconciliation and Revenge in Post-Apartheid South Africa – Rethinking Legal Pluralism and Human Rights," *Current Anthropology*, 41(1), February 2000**

Wilson analyses the tension between the national post-apartheid human rights discourse, which is based on the reconciliation formed around shared values and institutional structures. She examines the logic of retributive justice found in township courts (*lekgotla*) and concludes that the differences in legal orders in South Africa has its basis in these different conceptions of justice.

- 44. Winslow Tom, "Reconciliation: The Road to Healing? Collective Good, Individual Harm?" *Track Two*, 6(3&4), December 1997**

This article regards the South African Truth and Reconciliation Commission as successful in generating national reconciliation and healing but is skeptical if it took place at the individual level. Winslow highlights some aspects of the truth and reconciliation process that hampered personal reconciliation and healing. He also suggests that reconciliation is not a *conditio sine qua non* for healing as individual healing can take place without reconciliation but accepts that reconciliation does go a long way to secure individual healing.

- 45. Zalaquett Jose, "Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations," *Hastings Law Journal*, 43(6), August 1992**

Zalaquett argues that it is the prevailing political environment that shapes what human rights strategy a newly established democracy will embrace in confronting past human rights atrocities. He supports this approach, urging however that international law be respected in this enterprise. He also provides the example of the Chilean truth commission as a way of illuminating how past violations of human rights can be addressed despite political constraints.

B. General Interest Periodicals

- 46. Adam Heribert, "Trading Justice for Truth," *The World Today*, January 1998**

Adam examines the South African Truth and Reconciliation Commission and ponders on whether it would achieve national reconciliation and unity.

47. Ash Garton Timothy, "True Confessions," *New York Review of Books*, July 17, 1997

This is a critical examination of the South African Truth and Reconciliation Commission. It exposes its strengths and weaknesses.

48. Bell Malcolm, "Guatemala Offers Model for Facing Harsh Truths," *National Catholic Reporter*, 34(33), July 3, 1998

Bell offers that the US should follow Guatemala in exploring its past and exposing the gross human rights violations tucked therein.

49. Doyle Kate, "Helping Guatemala Find the Truth," *New York Times*, March 1, 1999

This article focuses on the role of the US government in training the Guatemalan military that committed human rights violations and notes that this truth emerged from secret files provided by the US government to the Guatemalan truth commission. It urges such further US government co-operation in exposing this history of assistance, especially in Latin America.

50. Ignatieff Michael, "The Right Trial for Milosevic," *The New York Times*, October 10, 2000

Ignatieff examines the question of how to address the excesses of Sloban Milosevic arguing against sacrificing the search for justice at the altar of orderly transition and reconciliation in Serbia.

51. Lansink Annette, "Forget Revenge...What about Compensation?" *Africa News Service*, March 30, 2000

Lansink urges compensation for the victims of apartheid in order to conclude on the work of the South African Truth and Reconciliation Commission and building a foundation of lasting peace and justice.

52. Larmer Brooke, "When the Truth Isn't Enough: Struggling to Draw the Line between Justice and Vengeance," *Newsweek*, 127(16), April 15, 1996

Larmer examines the comparative virtues of truth commissions and tribunals and trials in making a case for finding a balance between the need for justice and the fear of reviving latent hostilities.

53. Lyons Beth S., "Between Nuremberg and Amnesia: The Truth and Reconciliation Commission in South Africa," *Monthly Review*, 49(4), September 5, 1997

Lyons considers the contentious issue of amnesty as provided by the South African Truth and Reconciliation Commission and notes that it is both a strength and weakness of that body given the political context in South Africa.

54. Navarro Mireya, "Guatemalan Army Waged 'Genocide,' New Report Finds," *New York Times*, February 26, 1999

This article highlights the release of the Guatemalan truth commission report and focuses on the exposure of the US role in supporting Guatemalan military and paramilitary units which it was aware were committing atrocities against the Mayans.

55. *National Catholic Reporter*, "Discoveries Underline Need for Truth Commission," 36(29), May 19, 2000

This article focuses on revelation of US involvement with the Salvadoran military which was found to be involved in human rights atrocities and calls for a truth commission in the US to facilitate the full disclosure of US involvement in human rights violations in Central America.

56. *New York Times*, "Guatemala's Nightmare Past," February 28, 1999

The article highlights the release of the report of the Guatemalan truth commission and urges the Guatemalan government to adopt it and undertake its recommendations.

57. Roberts Tom, "Inside NCR," *National Catholic Reporter*, Kansas City, 36(37), August 25, 2000

This article highlights the report of the Guatemalan truth commission and its indictment of the US for supporting the repressive Guatemalan regime and military.

58. *The Economist*, "The Trouble with Amnesties," August 19, 2000

This article questions the justice of amnesties and plays devil's advocate by asking what would happen to national stability if the amnesties granted by South Africa's Truth and Reconciliation Commission were now repudiated.

59. *The Economist*, "South Africa – Half Truth," June 17, 2000

The article points out the hiccups faced in the South African truth and reconciliation process with regard to work overload for the amnesty committee and delays in the reparations program especially following the conclusion of hearings.

60. *The Economist*, "In Search of Truth and Justice: Accounting for the Violence in East Timor," February 5, 2000

This article highlights the reports of two commissions which, independent of each other, implicated the Indonesian military of human rights atrocities following the majority vote for the independence of East Timor from Indonesia.

61. *The Economist*, "Leaders: A Lesson from South Africa," October 31, 1998

This article assesses the report of the South African Truth and Reconciliation Commission, which it says was objective.

62. *The Economist*, "Confronting the Past: New Democracies Need to Investigate the Crimes of Displaced Despots," 345, November 1, 1997

This article calls for truth-seeking by newly democratic states as a means, not to focus on the past, but to ensure that the mistakes of the past are not repeated.

63. ***The Economist*, “Burying South Africa’s Past: Of Memory and Forgiveness – What has the Truth and Reconciliation Commission Accomplished?” 345, November 1, 1997**

This article evaluates the South Africa’s Truth and Reconciliation Commission, its purposes, its approaches and its challenges. It argues that it has consolidated peace and contributed to national reconciliation.

64. **Thurrow Roger, “Healing Pains: South Africa Shows Just How Tricky is Reconciliation’s Path – A Truth Commission Pried into Apartheid Horrors, but what of ‘Justice’? – A Blind Man Grows Restless,” *Wall Street Journal*, July 17, 2000**

Thurrow argues that the South Africa’s struggle for truth and reconciliation is handicapped by the failure to improve the socio-economic conditions of most victims. He notes that the view of the South African Truth and Reconciliation Commission was that there would be no meaningful reconciliation without reparations.

C. Books and Book Chapters

65. **Asmal Kader; Louise Asmal; and Ronald Suresh Roberts, *Reconciliation through Truth: A Reckoning of Apartheid’s Criminal Governance*, New York, St. Martin’s, 1997**

This book examines the issues of transitional justice in South Africa, given the past apartheid era that was a gross violation of the fundamental human rights of the majority and the challenge of extirpating the apartheid legacy.

66. **Ball Howard, *Prosecuting War Crimes and Genocide: The Twentieth Century Experience*, Lawrence, KS, Kansas University Press, 1999**

This book examines the most egregious war crimes and acts of genocide in the 20th Century as well as how the international community has moved to establish universal jurisdiction in such cases. The book does not examine other alternative transitional justice methods outside prosecutions.

67. **Boraine Alex, *A Country Unmasked: South Africa’s Truth and Reconciliation Commission*, New York: Oxford University Press, 2001**

Boraine offers a front row seat to the workings of the South African Truth and Reconciliation Commission, discussing its genesis, establishment, operationalisation and conclusion.

68. **Feldman Lili Gardner, “Reconciliation and Legitimacy: Foreign Relations and Enlargement of the European Union,” In Bachoff, Thomas and Mitchell Smith, (Eds.), *The Legitimacy of the European Union*, New York, Routledge, 1998**

This chapter looks at how the reconciliation process applies to post-war Europe as epitomized by the European Union.

69. **Goodman David, *Fault Lines: Journeys into the New South Africa*, Berkeley, CA, University of California Press, 1999**

This book looks at the challenge of achieving reconciliation in South Africa given its horrific history of apartheid.

- 70. Hayner Priscilla B., *Unspeakable Truths: Confronting State Terror and Atrocities*, New York, Routledge, 2001**

Hayner presents a penetrating analysis of 21 truth commissions that have been established since 1974. She looks at the rationale, establishment and inner workings of truth commissions and shows truth commissions as a viable transitional justice alternative.

- 71. Hurley M., "Amnesty, Truth or Prosecution?" In Reychler Luc and Thania Paffenholz, *Peace-building: A Field Guide*, Boulder, CO, Lynne Rienner Publishers, 2001**

This is a discussion of the debate on whether to prosecute and punish on the one hand or to forgive and forget on the other when considering how to deal with the excesses of past inhumane regimes.

- 72. Hurley M., "Dealing with the Past in South Africa," In Reychler Luc and Thania Paffenholz, *Peace-building: A Field Guide*, Boulder, CO, Lynne Rienner Publishers, 2001**

This is an examination and short but critical evaluation of the South African Truth and Reconciliation Commission.

- 73. Kritz, Neil J., (Ed), *Transitional Justice: How Emerging Democracies Reckon With Former Regimes*, Washington DC, US Institute of Peace, 1995, Three volumes**

This is a wide, pithy and detailed look at the whole area of transitional justice.

- 74. Krog Antjie, *Country of My Skull: Guilt, Sorrow and the Limits of Forgiveness in the New South Africa*, Johannesburg, Random House, 1998**

This work is the detailed personal and sometimes painful account of Antjie Krog, a journalist who covered the South African Truth and Reconciliation Commission with the South African Broadcasting Corporation, into the gruesome testimonies of the victims of apartheid.

- 75. Lederach John Paul, *Building Peace: Sustainable Reconciliation in Divided Societies*, Washington DC, US Institute of Peace, 1997**

This is a discussion of the theoretical and conceptual ramifications of reconciliation and how it can be used to bring together individuals and peoples.

- 76. Lederach John Paul, *The Journey toward Reconciliation*, Scottdale, PA, Herald Press, 1999**

This book contains different stories that helped form Lederach's thoughts about reconciliation. It also relates some personal experiences on the road to reconciliation and shows some of the bottlenecks involved.

- 77. McAdams James A., (Ed), *Transitional Justice and the Rule of Law in New Democracies*, Notre Dame IN, University of Notre Dame Press, 1997**

This book originates from a symposium at the University of Notre Dame and is a collection of different articles on the diverse thoughts and views of several authors on how and why new democracies should deal with old autocracies.

- 78. Meredith Martin and Rosenberg Tina, *Coming to Terms: South Africa's Search for Truth*, New York, Public Affairs, 1999**

This book is in two parts. In the first part, Meredith examines the minute and dramatic details of testimonies presented at the South African Truth and Reconciliation Commission. In the succeeding part, Rosenberg looks at how other nations have dealt with repressive pasts and also examines international developments that create precedents on how countries can bring past dictators to account.

- 79. Minow Martha, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, Boston MA, Beacon Press, 1998**

This work looks at some of the comparative advantages and disadvantages of truth commissions as well as some of the intriguing dilemmas truth commissions pose in addressing past human rights excesses.

- 80. Montville Joseph V., "Complicated Mourning and Mobilization for Nationalism," In Brown Jerome, (Ed.), *Social Pathology in Comparative Perspective: The Nature and Psychology of Civil Society*," Westport CT, Praeger, 1995**

Montville looks at the psychology of peacemaking offering a critique on how international politics has not taken into account the individual and group psychological needs in these processes.

- 81. Montville Joseph V., "The Healing Function in Political Conflict Resolution," In Sandole D. and H. van der Merwe, (Eds.), *Conflict Resolution, Theory and Practice*, Manchester England, Manchester University Press, 1989**

Montville gives a methodological examination of how reconciliation is applied to ethnic and religious conflicts and suggests how this can then be used in other conflicts, in the Middle East and Northern Ireland, for example.

- 82. Montville Joseph V., "The Psychological Burdens of History," In *A Handbook on International Conflict Management and Resolution*, Washington DC, US Institute of Peace, n.d.**

Montville argues for an appreciation and acceptance of the need to address the psychological needs of both victims and victimizers in conflicts for any meaningful resolution to be achieved.

- 83. Neier Aryeh, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice*, New York, Times Books, 1998**

Neier studies war crimes tribunals, their virtues as well as the issues they raise. He makes a case for a permanent international war crimes tribunal.

- 84. Nino Carlos Santiago, *Radical Evil on Trial*, New Haven CT, Yale University Press, 1997**

This book examines the case of Argentina and how it dealt with previous human rights abuses and also looks at the problem of transitional justice through different lenses: moral, political and legal.

85. O'Donnel Guillermo, Schmitter Phillipe C., and Whitehead Lawrence, (Eds.), *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies*, Baltimore, John Hopkins University Press, 1986

This is an analytical, comparative and reflective work on how transitions from autocracy and repression to democracy and tolerance have been and can be achieved.

86. Popkin Margaret, *Truth without Justice*, University Park PA, Pennsylvania State Press, 2000

This book examines the problems of achieving both truth and justice in El Salvador, looks at the role of the United Nations, United States, the El Salvador Truth Commission and civil society in this process.

87. Ratner Steven R. and Abrams Jason S., *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, New York, Oxford University Press, 1997

This book reviews how perpetrators of gross human rights violations can be brought to justice under international law and the problems attaching thereto.

88. Roht-Arriaza Naomi, (Ed.), *Impunity and Human Rights in International Law and Practice*, New York, Oxford University Press, 1995

This book provides a look at how some states in Europe, Asia, Africa and Latin America as well as international law have dealt with issues related to serious human rights violations and makes suggestions on the way forward.

89. Rotberg Robert I., and Thompson Dennis, (Eds.), *Truth v. Justice: The Morality of Truth Commissions*, Princeton NJ, Princeton University Press, 2000

This is a thoughtful compilation of different perspectives evaluating the methods of the South African Truth and Reconciliation Commission raising, for example, questions on whether it is proper to serve truth at the expense of justice.

90. Shea Dorothy C., *The South African TRC: The Politics of Reconciliation*, Washington DC, United States Institute of Peace Press, 2000

This book looks at the South African Truth and Reconciliation Commission, the extent to which it drew the lessons of earlier truth commissions, its tackling of contentious issues that it faced, and its general impact and the teachings it offers.

91. Tutu Desmond Mpilo, "Reconciliation in Post-Apartheid South Africa: Experiences of the Truth Commission," In Hopkins Jeffrey, (Ed.), *The Art of Peace: Nobel Peace Laureates Discuss Human Rights Conflict and Resolution*, Ithaca, NY, Snow Lion Publications, 2000

This is based on an informal conversation among Nobel Peace Laureates. Tutu defends the South African Truth and Reconciliation Commission and reflects on how the South African example can be used to disentangle other tricky political transitions.

92. Tutu Desmond Mpilo, *No Future without Forgiveness*, New York, Doubleday, 1999

This is Tutu's personal account as the Chair of the South African Truth and Reconciliation Commission. It outlines his thoughts on the need to both get to the truth and walk through the difficult process of reconciliation.

93. **Villa-Vicencio Charles and Verwoerd Wilhem, (Eds.), *Looking Back – Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*, Cape Town, University of Cape Town Press, 2000**

This is a collection of articles on issues surrounding truth and reconciliation by commissioners, senior staff members and associates of the South African Truth and Reconciliation Commission. It also examines different aspects on the South African Truth and Reconciliation process. There is also a comparative look at the South African Truth and Reconciliation Commission and the relationship between truth commissions and international law.

ANNEX 6. COMPARATIVE ANALYSIS OF TRUTH COMMISSIONS

ACKNOWLEDGMENT

This paper draws heavily from the thoughts, ideas and dilemmas posed in Priscilla Hayner's² book, *Unspeakable Truths*,³ which offers a rich study of various truth commissions, their establishment, workings, structures, membership, mandates, weaknesses and strengths.

It also borrows extensively from a chapter authored by Mark Freeman and Priscilla Hayner of the International Centre for Transitional Justice on "Truth Telling" in a handbook by the International Institute for Democracy and Electoral Assistance titled *Reconciliation after Violent Conflict*.⁴

Introduction

Following democratic elections on 30 December 2002 ushered in a new political era began in Kenya. Suddenly, there was a new opportunity to make a clean and clear break with over a century of authoritarian rule. The electoral loss of the then ruling political party, Kanu, to Narc by a sizeable margin in effect renewed hope of a transition to democracy in the country.

A key aspect of that democratic transition is the issue of transitional justice and the mechanisms that should be put in place to midwife the process. Hence, it is in this context that the issue of a truth commission is being examined.⁵

Various approaches have been employed to redress past human rights violations. Professor Makau Mutua defines their spectrum as: "at the one extreme these responses could include criminal prosecutions, on the other, the granting of blanket amnesties to the perpetrators...Each country must decide where...(it) fits between each of these two poles...of amnesty and prosecution."⁶

He proceeds to argue that "Truth commissions are established for gross human rights violations that normal courts cannot, are unwilling, or unable, to address. Each country must decide where a truth commission fits..."⁷

The question of just where a truth commission would appropriately fit is "best understood when situated in the actual political realities and in the transitional political context, which includes the features of the predecessor regime as well as political, juridical, and social contingencies."⁸ Amy Ansell, Associate Professor of Sociology at Bard College recognizes that "truth commissions are not established in situations of complete defeat of former powers, but rather in situations of political compromise."⁹

Yet it is not in question that truth commissions "are created principally at the time of a state's transition toward a more democratic or participatory government, a government that espouses the ideals of democracy, of power bounded by law, of formal legal equality, and social justice. It matters not how the moment of political change occurred; it could have been violent or non-violent, such as Kenya's. What matters is that there is a normative and substantive departure by the successor government or state from its predecessor. Thus it could be change from autocracy to democracy, from opacity to transparency, from open shameless graft to fiscal and economic accountability. But that change must be structural, ideological, and fundamental, it cannot be a continuation of the same, the change must signal real and genuine regime change."¹⁰

Molly Andrews, co-director of the Centre for Narrative Research and Senior Lecturer in Psychosocial Studies at the University of East London, points out that, "when a society suffers an "administrative massacre" its members will often seek to reconstruct its institutions on the basis of a shared understanding of what went wrong...mostly, they tell stories. The "telling and retelling" of a people's central stories constitutes its collective identity."¹¹

She adds that "truth Commissions are one way in which citizens of a country help to determine what shall be included and what shall be left out in the story a nation tells itself about a traumatic past."¹²

Characteristics of Truth Commissions

There have been at least 25 truth commissions established around the world since 1974.¹³ Although they have gone by different names, and sometimes did not themselves during their operations even acknowledge being truth commissions, they generally share the following characteristics:¹⁴

- Are temporary bodies, usually in operation for one or two years;
- Are officially sanctioned, authorized or empowered by the state;
- Are non-judicial bodies that enjoy a measure of *de jure* independence;
- Are usually created at a point of political transition, either from war to peace or from authoritarian rule to democracy;
- Focus on the past;
- Investigate patterns of abuses and specific violations over a period of time, not just a single specific event;
- Complete their work with the submission of a final report that contains conclusions and recommendations; and
- Focus on violations of human rights and sometimes of humanitarian norms as well.

Their work offers extremely useful insights in the do's and don'ts of how to establish and operate a truth commission. Yet it is clear from the outset that there is no single universal model applicable to all nations, societies and peoples.¹⁵ Indeed, Harvard University's Professor Henry Steiner has observed, "The truth commission has been a protean organ, not only in the many institutional forms it has assumed, but also in its varying membership, in the diverse functions it serves, and its range of powers, methods, and processes. Each country...has given its commission a distinctive architecture."¹⁶

It would, however, be remiss not to study and imbibe the lessons offered by other truth commissions. Steiner states: "...what rapidly becomes apparent is that concrete examples drawn from different countries must inform abstract description. No architect of these institutions has proceeded by deduction from general principles."¹⁷ In failing to study other experiences, we would, to borrow Hayner's words, "retrace the errors and struggle with the same difficulties that others have in the past."

What lessons?

Several clear questions, that Kenya will need to grapple with, suggest themselves when reviewing the experiences of the truth commissions that have been established in different jurisdictions. These include:

1. Why (not) form a Truth Commission?
2. When is a Truth Commission formed?
3. How is a Truth Commission formed?
4. What scope and mandate is ideal for a Truth Commission?
5. What powers should be vested in a Truth Commission?
6. For how long should a Truth Commission operate?
7. How are Commissioners appointed to a Truth Commission?
8. What are the staffing needs of a Truth Commission?
9. What period in history is to be investigated by a Truth Commission?
10. Should the Commission hearings be in public?
11. How will information be managed by the Truth Commission?
12. Will there be a witness protection program in place?
13. How adequately will abuses of women be handled?
14. How is the question of amnesty to be dealt with?
15. The danger for re-traumatisation
16. The issue of reconciliation
17. What standard of proof will be adequate for the Commission?
18. The question of reparations
19. Relations with concurrent judicial investigations
20. The resources for a Truth Commission

21. The naming of names in the final report
22. The question of follow-ups after a Truth Commission winds up
23. The principal activities of a Truth Commission (including networking with local and international partners)
24. The issue of how serious economic crimes will be dealt with by a Truth Commission

Let us now examine each of the issues outlined above.

Why (not) form a Truth Commission?

Justice and constitutional Affairs minister Kiraitu Murungi has stated: "We cannot move forward without referring to the past. Just as a tree grows upwards, its roots grow downwards...We need to uproot weeds in the garden so that we can plant."¹⁸ Speaking at the same conference, Professor Makau Mutua, Chair of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission observed that, "A state that sees no evil, hears no evil and speaks no evil is an evil state." Kenyan freedom fighter Bildad Kaggia is also quoted as having said: "You cannot wish away history and history is not what you want to happen. History is what happened and it will stay whether you like it or not."¹⁹

In his book, *The File: A Personal History*,²⁰ Timothy Garton Ash extols Jewish wisdom that "to remember is the secret of redemption" and recalls George Santayana's words that "those who forget the past are condemned to repeat it."

Alex Boraine, Vice-Chair of South Africa's Truth and Reconciliation Commission, notes that "dealing with the past is inescapable, if we are working towards a peaceful future...To ignore the past is to perpetuate victimhood. We are aware that many countries continue to be haunted by their past. For the sake of justice, for stability and the restoration of dignity to victims, there must be accountability for the past. And as an added benefit, such accountability could be a deterrent to those who might be tempted in future to engage in gross human rights violations."²¹

Colin Bundy points out that "the establishment of the objective truth is part of the struggle for the control of history. It plays a central role in society's redefinition of itself."²² In May 1985, Richard von Weizsacker, then President of West Germany commented, "Whoever closes his eyes to the past becomes blind to the present. Whoever does not wish to remember inhumanity becomes susceptible to the dangers of new infection. And former US President Gerald Ford is recorded as having stated, "Learning from our mistakes is not pleasant, but...we must do so if we need to avoid repeating them." In Switzerland, the President is quoted as having said, "I've spent ten years in the government. Until last year no one – I mean no one – spoke of the fundamental necessity of reexamining Swiss history. Now I realize this must be done, because a country that has not really faced its past cannot decide its history."²³

Albert Camus exhorts: "Truth is as mysterious as it is inaccessible and it must be fought for eternally." On the other hand, Poet Maya Angelou writes,

History, despite its wrenching pain,
Cannot be unlived, and if faced
With courage, need not be lived again²⁴

Hence, there is clear consensus on the need to revisit the past, to learn from it and use the compass of these lessons to navigate the future. "...there is an emerging sentiment in international advocacy circles that official truth-seeking should always be recommended for countries emerging from authoritarian rule. Policy statements of both Amnesty International and Human Rights Watch...call for investigation into the

truth about gross violations of human rights whenever such violations take place. Many cite emerging international law to back the “right to truth” and confer an obligation on the government to investigate...Likewise, international “principles to combat impunity” proposed in 1997 by United Nations Special Rapporteur Louis Joinet includes a recommendation for a commission of inquiry to establish the truth about the past in a transitional country. “Full and effective exercise of the right to truth is essential to avoid any recurrence...in the future,” these recommendations state.

The document continues: “A people’s knowledge of the history of their oppression is part of their heritage and, as such, shall be preserved by appropriate measures in fulfillment of the State’s duty to remember. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.”...Yet there may be cases in which a “truth always” recommendation is not appropriate, or at least in which a recommendation for a formal and official truth-telling project such as a truth commission might be inappropriate.”²⁵

Perhaps the most compelling reason why the road of a Truth Commission should be trod is that the people ask for or demand it. Hayner observes, “...ultimately, the decision whether or not to institute broad truth-seeking should be made by the country itself.”²⁶ She continues, “...neither the quantity nor the type of human rights abuses, nor whether the abuses have already been documented by previous efforts, will determine the suitability or prescribability of official truth-seeking. A relatively small number of cases does not lessen the urgency of the issue...Instead, the primary measure to determine the importance of a truth commission is found in the desire for a truth-seeking process from within the society under question. It is hard to measure these sentiments in concrete terms... Opinion polls are unrealistic in most countries, and fear of speaking publicly about government abuses may continue long after...the departure of a repressive regime...although there may be no means of formal measurement...governments should be guided by expressed national preferences, especially those of victims or groups that represent them. In those countries where there is a generalized lack of interest in or resistance to digging up the past, this is likely to be reflected at all political and societal levels: a preference for letting go, an uncomfortableness in talking of the past...Elsewhere, the demand for truth and accountability is made clear through public demonstrations, lobbying from victims or human rights organizations...”²⁷

Other reasons why a Truth Commission should be established are that it can:²⁸

- **Help establish the truth about the past:** Professor Makau Mutua writes, “Another function, which is probably the most important one, is that of truth telling, where the perpetrators bare all, and the victims recount the horrors visited upon them by the sadism of the state.”²⁹ “The ultimate goal of the truth commission, in fact its *raison d’être*, is the search for truth,” writes Charles Manga Fombad, Associate Professor of Law at the University of Botswana. Alex Boraine observes that, “one of the major advantages of a truth commission...is...inclusive truth telling.”³⁰ He proceeds to categorize these as the objective or factual or forensic truth; the personal or narrative truth; the social or dialogical truth; and the healing and restorative truth.³¹

Writer Michael Ignatieff states: “The past is an argument and the function of truth commissions, like the function of honest historians, is simply to purify the argument, to narrow the range of permissible lies.”³² The aim here is for the Truth Commission to establish an “accurate record of a country’s past, clarify uncertain events, and lift the lid of silence and denial from a contentious and painful period of history.”³³ It establishes “a record of the past that is accurate, detailed, impartial and official. This record can serve to counter the fictitious or exaggerated accounts of the past that were propagated by the previous regime...and bring the true scale and impact of a violent past to the public consciousness.”³⁴

In this regard, it may not even be telling a new truth, rather it may be acknowledging or formally recognizing a truth that may be generally well known that is critical, especially where official denial was pervasive.

In Chile, survivors cite a public apology by the state during an emotional appeal for pardon and forgiveness by the President when releasing the Chilean truth report to the public as a powerful moment after having their claims brushed aside for so many years.³⁵ Molly Andrews notes that, “the power of truth commissions lies not so much in discovering the truth – in the form of new facts – as in acknowledging it.”³⁶

- **Promote the accountability of perpetrators of human rights violations:** The evidence collected by a Truth Commission could be used in subsequent prosecutions, or to recommend other sanctions such as civil liability, removal from office, restitution or community service. An example of a country where evidence gathered by a Truth Commission has been instrumental in this regard is Argentina where it was used to quickly build cases against nine senior members of the previous regime.³⁷ It should also be noted that, “Baltasar Garzon, the Spanish judge who brought charges against Augusto Pinochet, relied heavily on the Chilean truth commission report to build his case. Likewise, international human rights groups started with the truth commission report in Chad in their attempts to bring charges against former ruler of Chad, Hisssein Habre.”³⁸
- **Provide a public platform for victims:** A truth commission can put victims at the epicentre of the process, giving them a sense of personal vindication. It could also help educate the public about the adverse effects of past crimes on individuals, thus creating support for such victim-centred initiatives as reparations programs.
- **Inform and catalyse public debate:** A truth commission can “help stimulate public deliberation on the complex array of moral, political and legal issues that must be addressed during a transition process. This can be achieved by engaging with the public through commission activities and encouraging broad media coverage. In addition, truth commissions can themselves serve as a model for the public, as the public begins to take up again the critical practice of discussing controversial political subjects without fear of recrimination or resort to violence. Commissions can also serve as independent, impartial and public arbiters if and when members of the previous regime grossly misrepresent or distort events of the past.”³⁹ In this regard, it has been noted that in, for instance, South Africa media coverage of the Truth Commission “was intense: most newspapers ran a number of stories on the commission every day, and radio and television news often led with a story on the most recent revelations from the commission’s hearings. Four hours of hearings were broadcast live over national radio each day, and a *Truth Commission Special Report* television programme on Sunday evenings quickly became the most-watched news in the country.”⁴⁰
- **Recommend victim reparation:** Given past abuses and ongoing psychological and economic injuries arising as a result, a Truth Commission can build cases for reparation as well as establish fair and effective definitions and categories of “victims” in order to process compensation. A truth commission could also suggest symbolic reparations such as memorials, reburials and commemorative ceremonies. Different Truth Commissions have gone about this objective in different fashions,⁴¹ as we shall see later on this briefing.
- **Recommend necessary legal and judicial reforms:** Professor Steiner argues that, “Realization of (or at least toward) fundamental change appears to be an almost constant companion to the use of truth commissions. A repressive regime succeeding as repressive a government that it has ousted from power is unlikely to explore prior misdeeds that may be ideally suited to its own malign

purposes.”⁴² Part of the architecture of past repression has been the structures or institutions that have failed to uphold the protection of human rights by condoning or even themselves perpetrating human rights abuses. A truth commission can clearly and authoritatively identify these institutions and recommend their reform by, for example, strengthening civilian oversight of intelligence agencies and the military; new appointment, tenure and disciplinary rules for the judiciary, the establishment of an independent and well-financed prosecutor’s office, re-design of the electoral and political system, land reform, and new human rights training programs for the disciplined forces.⁴³ Examples are given: “While some of the earlier truth commission reports provided only very brief and general recommendations, those in more recent years have been much more extensive, usually including a full and detailed chapter outlining specific reforms across many sectors of government and public life. The El Salvador report’s recommendation ran for fifteen pages, South Africa’s forty-five pages, and Chile’s over fifty-five pages.”⁴⁴

- **Promote social reconciliation:** The process of hearing out grievances and suffering can be therapeutic and promote tolerance. In his book *No Future Without Forgiveness*, Archbishop Desmond Tutu notes that, “it is crucial, when a relationship has been damaged or when a potential relationship has been made impossible, that the perpetrator should acknowledge the truth and be ready and willing to apologize. It helps the process of forgiveness and reconciliation immensely. It is never easy...if the process of forgiveness and healing is to succeed, ultimate acknowledgement by the culprit is indispensable – not completely so but nearly so...”⁴⁵

Professor Makau Mutua further argues that a truth commission “can act as a sort of a national catharsis in which the country goes through a deep and penetrating process of cleansing the past. This function is akin to therapy. It can perform the function of moral reconstruction, in which a country takes stock of its morality in politics, governance, cultural values, and its view of humanity. Moral reconstruction implies learning lessons from the past and revising the nation’s moral code. It could be a vehicle for reconciliation after truth and justice have been told and done. Here, society must pass judgment on what it has heard; it must, in effect, establish a moral account of the historical record.”⁴⁶ The Truth and Reconciliation Commission in South Africa had, at its public hearings, “a huge sign behind the panel of commissioners that read, Truth: The Road to Reconciliation. Posters promoting the commission coaxed, “Let’s speak out to each other. By telling the truth. By telling our stories of the past, so that we can walk the road to reconciliation.”⁴⁷ As we shall see later, however, achieving this aim remains contentious, and an issue that needs to deep reflection upon.

- **Help consolidate democratic transition:** A truth commission could “signal a formal break with a dark and violent past, and the transition to a more open, peaceful and democratic future. If they are successful, truth commissions can have the effect of weakening anti-democratic actors who might otherwise continue to pursue their goals outside the democratic process.”⁴⁸

In the introduction of the *Report of the Chilean National Commission on Truth and Reconciliation*, Commission member Jose Zalaquett summarizes the importance of a truth commission, thus: “The truth is considered as an absolute, unrenounceable value for many reasons. In order to provide for measures of reparation and prevention, it must be clearly known what it is that ought to be repaired and prevented. Further, society cannot simply black out a chapter of history, however differently the facts may be interpreted. The void would be filled with lies or conflicting versions. The unity of a nation depends upon a shared identity, which, in turn depends largely on a shared memory. The truth also brings a measure of social catharsis and helps to prevent the past from recurring. In addition, bringing the facts to light is, to some extent, a form of punishment, albeit mild, in that it provokes social censure against the perpetrators or the institutions or groups they belonged to. But although the truth cannot really in itself dispense justice, it does put an end to many a continued injustice – it does not bring the dead back to life, but it brings them out

of silence; for the families of the 'disappeared', the truth about their fate would mean, at last, the end of an anguishing, endless, search..."⁴⁹

Conversely, a Truth Commission should not be established if the people do not recommend it. Alex Boraine, the vice-chair of the South African Truth and Reconciliation Commission notes: "On the other hand, there are powerful voices that urge that the way to deal with the past is to forget and move on...for many of them it is not a question of ignoring the atrocities that have been committed so much as a concern to consolidate and protect our emerging democracy. Of course, there are some who simply wish to ignore the past because of their involvement in it. But there is a defensible position which calls for moving into the future and not allowing the past to destroy or inhibit the new democracy."⁵⁰

And Timothy Garton Ash observes: "There is profound insight of the historian Ernest Renan that every nation is a community both of shared memory and shared forgetting. 'Forgetting,' writes Renan, 'and I would say even historical error, is an essential factor in the history of a nation.' Historically, the advocates of forgetting are many and impressive. They range from Cicero in 44 B.C., demanding just two days after Caesar's murder that the memory of past discord be consigned to 'eternal oblivion,' to Winston Churchill in his Zurich speech 2000 years later, recalling Gladstone's appeal for a 'blessed act of oblivion between former enemies.'"⁵¹

Yale University Professor Bruce Ackerman also says that "moral capital" is better spent in educating the population of the limits of the law rather than in engaging in a "quixotic quest after the mirage of corrective justice." He cautions that any attempts at corrective justice will generate "the perpetuation of moral arbitrariness and the creation of a new generation of victims because of the inevitable deviations from due process that would attach to trials."⁵²

Hayner⁵³ commits a whole chapter of her book discussing this issue (titled "Leaving the Past Alone") and uses the cases of Mozambique and Cambodia as studies in this area. Freeman and Hayner⁵⁴ note that "in transitional contexts ranging from Spain in the 1970s and Cambodia in the 1980s to Mozambique in the 1990s, civil society and democratic political leaders have sometimes consciously opted against any attempt at formally establishing the truth about the past." They give the reasons as:

- **Fear of ongoing or renewed violence or war:** A Truth Commission should not be formed where there is a perception that violence would return, increase or fail to end if past abuses are revisited.
- **Ongoing conflict:** Whenever there is armed conflict going on, the utility of a Truth Commission is in serious doubt because it is near impossible to effect the perception of neutrality and also guarantee the security of all involved.
- **Lack of political interest:** Where there is no pressure from the political leadership or significant non-governmental actors for its formation, this could be a reason to cast aside the idea of a Truth Commission
- **Other urgent priorities:** There may be a national desire to focus on national survival and rebuilding following extensive destruction
- **Insufficient capacity:** There may be a lack of resources or basic infrastructure to support a Truth Commission
- **Alternative mechanisms or preferences:** There may be a cultural preference to avoid confronting past crimes (for example in Cambodia) or there may be existing community-based mechanisms (for example in Mozambique) that can better respond to past abuses.

Perhaps a key reason not captured in the above discourse on why not to have a truth commission is where its general purpose and design is general political expediency; to witch-hunt⁵⁵ or, alternatively, whitewash.

While asserting that, “of course, we should have a Truth & Reconciliation Commission; one that will help us put behind the dark years, and anchor us to a sense of national togetherness in the coming period,” Mr Pheroze Nowrojee argues that, “we are not yet ready for a TRC,” because an “edifice of trust” has yet to be built.⁵⁶ He contends that, “A successful commission...does not just happen. It takes national honesty. It takes hard work. To prepare ourselves for the genuine exchange of truth and reconciliation amongst ourselves, we must build more and more trust among ourselves. Although a TRC does also raise levels of trust, it cannot be the sole instrument of building trust...A TRC follows the generation of trust amongst a people, it does not precede it...We must address the difficult problems of trust, and as we resolve them we can simultaneously move to the TRC that must be held. Even then, the TRC will still have enormous national tasks. It will have to bring about the healing of individuals in a nation riven by silent suffering. It will aim at setting national history right. It will lay the foundation of the political practice of human rights...Therefore, there is much work to do before a TRC is announced. It must not be simply the creation of a newspaper campaign, which could stampede the country into a TRC before we are ready. It is a pretty concept [and] we all want to feel good. But it is also a complex concept...We must not use a TRC to create trust if there are no other processes ongoing to that end. That would reduce it to a convenient excuse for not solving hard problems. The critical aims of catharsis and the return of dignity of the people who have survived will be compromised. There are real dangers of such a process turning into a formulaic recitation of wrongdoing and public apology, and turning testimony into routine...That will not ensure the recording of history as it was painfully lived through...If we do not ensure this, the TRC will become only a selective and partial exercise.

Four things will then happen. Firstly, the victims will be victimized a second time around. Secondly, we will have another generation of forgotten survivors and freedom fighters. Thirdly, once again Kenya's history will have been left unrecorded and unacknowledged. Fourthly, undemocratic government will return because the memory of the freedom struggle will again have been erased...Effective reconciliation is a hard process. Cheap reconciliation is an easy process. It comes cheaply when the testing of conflicting views is avoided, or the media block out dissenting voices. It comes cheaply when no true debate takes place on it...We shall not cleanse Kenya by cheap reconciliation, by individual victims giving painful evidence in small halls, while others are elsewhere, enhancing their economic prospects...Therefore, the TRC should not be used as the political solution of the month. The TRC should not be another ‘piecemeal legislation’ by the new government. Nor should it be the press campaign of the month. Deeper foundations must be laid, when we can safely move forward to the establishment of a trusted TRC...”⁵⁷

RECOMMENDATIONS

The task force has engaged in a timely and useful exercise of public hearings to gauge whether or not Kenyans desire a Truth Commission. Based on its reading of the public mood, the task force is therefore fairly able to recommend whether Kenyans are agreeable to a Truth Commission or not.

Notably, after evaluating the examples of Mozambique and Cambodia, it is clear that their history has been characterized by internecine civil war; a phenomenon that, thankfully, did not happen in Kenya, which has a history of successive authoritarian regimes. In this regard, one would agree with the following excerpt from *Unspeakable Truths*:⁵⁸

Indeed, there are some examples around the world that seem to confirm the danger of allowing a country or its government the option of simply ignoring the legacy of past state crimes. African rights expert Richard Carver argues persuasively that several countries in Africa have suffered from such a policy, and that there have been clear negative long-term consequences from failing to come to terms with the past. For example, in Malawi, some of the repressive patterns of the past, such as laws allowing censorship, have received support from those who used to oppose them

under the old regime. If these laws and the effects that they have “were properly exposed to public view, the repressive tendencies would still be there, but there would be greater public will to resist them,” says Carver.

Let us now turn to the specific questions regarding the formation of truth commissions.

1. How is a truth commission formed?

Of the 21 truth commissions documented in *Unspeakable Truths*,⁵⁹ **12** were created through executive decree (President, Prime Minister or Ministry of Government and Police), **four** were created through the legislature (although in Sierra Leone there had been an earlier agreement to form it in the peace accord), **three** were arrived at through the avenue of the United Nations, and **two** were formed by an independent political entity (the African National Congress – ANC – in South Africa).

There are **two** visibly contending avenues through which a truth commission can be formed in Kenya. As Professor Makau Mutua has observed, “there are two possible routes for the establishment of a truth commission. The commission could to be established either as an independent organ by an act of parliament or through a presidential order under the powers granted him by the Constitution.”⁶⁰

But the use of either of these methods will have different effects, which the Task Force needs to consider. As Mark Freeman and Priscilla Hayner observe, “in many countries, the way in which a truth commission is created will have a direct effect on what its powers can be. For example, in democratic countries with presidential or semi-presidential forms of governance, the executive branch of government usually cannot, on its own, confer search and seizure or even subpoena powers, that tends to be the exclusive preserve of the legislative branch. The same may also be true in respect of powers of reporting, including the question of whether the commission can make binding recommendations. Similarly, who establishes the commission can affect the allocation of funding, since one branch of government may have greater access to resources and a greater commitment to the commission’s work.”⁶¹

Appointment by the President would be through the Commissions of Inquiry Act, Chapter 102 of the Laws of Kenya. The purpose of this Act is “to provide for the appointment of commissioners to inquire into and report on matters of a public nature referred to them by the President, to prescribe their powers, privileges and duties, and to provide for other matters relating thereto.” To achieve this objective, the President is vested with powers to issue a commission to a commissioner or commissioners to inquire “into any matter into which an inquiry would, in the opinion of the President, be in the public interest.”⁶² It is also provided that “every commission shall direct how the commission shall be executed.”⁶³

The greatest strength of establishing a Truth Commission in this manner is that it fulfils the need for timeliness, which arises under the question of when a truth commission should be formed (tackled below). As we shall see when considering this question, the recommended and appropriate time to form a truth commission is immediately.

A Truth Commission that is established under the Commissions of Inquiry Act “shall have the powers of the High Court to summon witnesses, and to call for the production of books, plans and documents, to examine witnesses on oath.”⁶⁴ The Act is silent as to what powers of search and seizure such a Commission would have. There are also explicit evidentiary limitations placed on such a Commission in order to protect the reputation of individuals.⁶⁵

It should be noted that Truth Commission established in this manner can have its mandate revoked or amended arbitrarily by the President, who can similarly dismiss a Commissioner; which could clearly impact on the independence of the Truth Commission. The need for independence of the Truth Commission

cannot be gainsaid. Makau Mutua observes: "...the truth commission must not be subject direction or dictation from any official or arm of government."⁶⁶ Section 4(1) of the Commissions of Inquiry Act states, "The President may at any time, if he considers it advisable to do so, revoke, or issue a commission amending a commission previously issued, and, without prejudice to the generality of the foregoing power, may by any such amending commission appoint an additional commissioner or commissioners, vary the designation of the chairman or deputy chairman of the commissioners, or appoint a new commissioner in the place of any commissioner who is or becomes unable or unwilling to act or dies or is, in the opinion of the President, or any reason unsuitable to continue to serve as a commissioner."

In addition, it is also notable that forming a Truth Commission under the Commissions of Inquiry Act has the potential of being carried out without due consultation and inclusiveness. However, this potential weakness can be easily cured if due attention is taken towards including the public in general and crucial stakeholders in particular in the drafting of its terms of reference and the appointment of commissioners. Boraine notes the importance of this when he records: "Very early on it was decided to involve as many individuals and organizations as possible in the framing of the Bill that would give the substance to the idea of a truth and reconciliation commission. This decision to democratize the process paid rich dividends."⁶⁷

A Truth Commission could also be established through an independent Act of Parliament. Whereas the method of forming a Truth Commission through Parliament under an independent Act will potentially take care of the weaknesses of a Truth Commission under the Commissions of Inquiry Act, it is noteworthy that this process through the legislature is likely fraught with political intrigue, brinkmanship, grandstanding and, ultimately, delay. The task force needs to be alive to the hostility from a large section of Parliament to the idea of a Truth Commission. In the run-up to the general elections in 2002, a large section of members of the now-ruling party Narc clearly refused to countenance the idea of the formation of a Truth Commission when it was suggested to them by officials of the Kenya Human Rights Commission; electing instead to loudly boo, heckle and jeer the movers of the idea. Kanu, as the former ruling party, will hardly be expected to support this idea when it is clear that it has the most to lose from such an interrogation of Kenya's political history.

A lesson from the withdrawal earlier in the year of anti-corruption bills, not on their substantive demerits, but because of political bickering within the ruling political coalition should serve as a loud warning that the establishment of a Truth Commission through an independent Act of Parliament could suffer the same fate, thus losing critical time and momentum. Moreover, in the existing political climate, there is a real danger of its powers being severely curtailed by Parliament as there is a considerable constituency within Parliament that is clearly threatened by the formation of a truth commission. It should not escape the mind of the task force that when their interests have previously been similarly threatened, some Parliamentarians have been as bold as to state that they would disable progressive legislation, as happened at the National Constitutional Conference when delegates' support of a provision to recall members of parliament in the draft constitution was met with a threat to withdraw legislative support. It is perhaps this weakness that Justice and Constitutional Affairs Minister Kiraitu Murungi was referring to when he lamented that "there are inherent structural limitations to radical reform in Kenya" as he opened the workshop organized by the task force on, "A Truth, Justice and Reconciliation Commission For Kenya: Prospects and Obstacles on 4 July 2003.

Recommendation: Exercising Presidential Power under the Commissions of Inquiry Act is the way to go. There does not seem to be an intention in the current Presidency to interfere with the working of independent institutions and there is clear goodwill emanating from this office. In relation to independence of the commission, it should be provided in its establishment that the Truth Commission shall not be subject to direction from any individual, institution or group.

2. When should a Truth Commission be formed?

It is clear that this should be undertaken immediately. Makau Mutua notes that “Kenya must establish a truth commission this year.”⁶⁸ He continues: “Truth commissions are created principally at the time of a state’s transition toward a more democratic or participatory government, a government that espouses the ideals of democracy, of power bounded by law, of formal legal equality, and social justice. It matters not how the moment of political change occurred; it could have been violent or non-violent, such as Kenya’s. What matters is that there is a normative and substantive departure by the successor government or state from its predecessor. Thus it could be change from autocracy to democracy, from opacity to transparency, from open shameless graft to fiscal and economic accountability. But that change must be structural, ideological, and fundamental, it cannot be a continuation of the same, the change must signal real and genuine regime change.”⁶⁹ Indeed, it should be noted that a defining characteristic that serves to define a truth commission is that it is, “usually created at a point of political transition, either from war to peace or from authoritarian rule to democracy.”⁷⁰

Moreover, at the point of political transition, there is oft-times great support for change and this can be used to create an environment that helps uncover and unlock secrets that have been hidden in the caves of history. It is instructive to look at, for example, the circumstances surrounding the declassification of top state secret files regarding Goldenberg by Attorney-General Amos Wako as widely reported by the media on June 18, 2003. Clearly, there is a need to take advantage of such cusps of public goodwill before they are eroded by political evolution. In this regard, Hayner observes: “Most countries are well served by a quick start to a truth commission. The political momentum and popular support for such an initiative are generally highest at the point of transition, as a new government takes power...and there is a narrow window to transform this momentum into serious reforms, purges of human rights abuses, or reparations for victims. A quick start to a truth commission can also have the secondary effect of holding off pressure for immediate reforms and other measures of accountability, giving the government time to take stock, plan and strengthen institutions as necessary to further its other transitional justice initiatives.”⁷¹

However, Hayner also points out an important exception to the “the quicker the better” rule. “South Africa spent eighteen months designing its Truth and Reconciliation Commission following democratic elections in 1994. This preparatory time was crucial to developing the commission’s complex empowering legislation, to gain the backing from almost all political parties, and to seek input from many outside observers through which the proposed commission gained legitimacy. The Committee on Justice of the South African Parliament held over 150 hours of public hearings on the legislation, taking input from human rights organizations, victims, an association of former police officers, churches, and others. International human rights groups made submissions critiquing the draft legislation. And finally, after the legislation was in place, the very public process of selecting commissioners...added many months, but these steps greatly improved and strengthened the commission.”⁷²

Recommendation: In order to expedite the formation of a truth commission as well as address the question of consultation and inclusiveness, it is recommended that:

1. The Task Force submits to the Minister in its report, a draft of the precise terms of reference of the suggested Truth Commission based on the domestic and international consultations it will have done.
2. The task force also suggests names of the people who in its view are eminently qualified to serve as commissioners in the Truth Commission, guided by the principle of affirmative action
3. Prior to submitting these terms of reference and names, the task force allows for their wide critique by principal national and international actors with a view to critiquing and refining them.

3. How are Commissioners appointed?

This is a critical question. Freeman and Hayner observe that “perhaps more than any other single factor, the persons selected to manage a truth commission will determine its ultimate success or failure. In fact, several commissions have run into serious problems that were clearly rooted in weak management by commissioners...As the public face of the commission, the commissioners’ personal and political authority can also be critical in dealing with recalcitrant authorities...*The key lesson from past truth commissions is that a commission will generally garner greater public and international support where its members are selected through a consultative process and where an honest attempt is made to ensure a fair balance in the representation of political views, ethnic or religious groups and gender.*”⁷³ (emphasis added)

Recommendation: In addition to submitting the names of those people it recommends to serve in the truth commission, the task force should also set out clear criteria that the suggested people meet to merit the appointment.

4. How many Commissioners?

This is really a resource question as well as one of manageability. Professor Makau Mutua suggests that, “it should consist of no more than 15 members chosen for their probity, expertise, and outstanding morality. Effective commissions are not large...The commission may include no more than three foreigners of known competence and expertise. This acts to check the partiality of nationals and bring in comparative experiences.”⁷⁴

Recommendation: In line with keeping the numbers down, the Truth Commission should have a maximum of 11 members.

5. The scope and mandate of a truth commission

Two critical issues to look into with regard to the scope and mandate of truth commission are:

1. How is that scope and mandate developed
2. What is the actual scope and mandate vested in a truth commission?

Freeman and Hayner note that “truth commissions enjoy greater legitimacy where the process of defining their powers and mandate includes active involvement from many different sectors of society. Although there is often a need to move quickly at a point of transition, it is important to attempt to build a broad base of support for the commission among several important constituencies. In some countries where the government established a truth commission with virtually no consultation with civil society, the commissions have suffered as a result. For example in Guatemala it took time and considerable effort for the truth commission to gain the backing of the religious and advocacy groups on which it depended to undertake its work.”

Boraine corroborates thus: “The reason for focusing on the recommendations of the NGOs is that without the contribution of civil society the Promotion of National Unity and Reconciliation Act would have been considerably poorer. It would be an injustice to overlook the extraordinary contribution by representatives of a wide variety of human rights organizations who gave of their time, energy, and expertise to ensure that the Commission would meet the demands, as they saw it, of adequately dealing with South Africa’s past.”⁷⁵

Prior experiences, with regard to the actual mandate, illustrate the fact that terms of reference should be sufficiently broad and flexible to allow investigation into all forms of rights abuses, leaving the commission the decision of what specific cases or practices to investigate and report.”⁷⁶ The example is given of El Salvador where the mandate was to look into, “serious acts of violence...whose impact on society urgently demands that the public should know the truth.”⁷⁷ This gave the commission the latitude to decide “to take testimony from thousands of victims, summarize the overall patterns of violence, and report on some thirty cases in depth, all of which went much further than what the crafters originally envisioned. The cases chosen for in-depth investigation were intended to be representative of typical victims, perpetrators, and types of abuse over the twelve years of civil war. The language of the El Salvador commission is a good model...”⁷⁸

This is contrasted with other mandates in other countries where there were clear and specific guidelines, hence restricting the Truth Commissions. “For example, a number of truth commissions have been directed to look only into disappearances, such as those in Argentina, Uruguay, and Sri Lanka; but such explicit restrictions risk excluding a significant portion of the truth. The Uruguayan commission missed the majority of human rights violations that had taken place during the military regime because of such a limited mandate; illegal detention and torture, which constituted the bulk of the abuses, were ignored. In Chile, the commission investigated disappearances, executions, torture leading to death, political kidnappings, and attempts on life by private citizens for political purposes, but its mandate prevented it from investigating incidents of torture that did not result in death...”⁷⁹

Recommendation: The “terms of reference should be sufficiently broad and flexible to allow investigation into all forms of rights abuses, leaving the commission the decision of what specific cases or practices to investigate and report.”⁸⁰ To avoid definitional problems (such as what is a “serious” human rights abuse) the Task Force can outline some situations/incidences/events that the Task Force should look into **as a minimum standard**.⁸¹

6. Powers of a Truth Commission

Freeman and Hayner observe that, “at a minimum, commissions generally need to be able to interview anyone who can provide relevant information, receive the cooperation of public authorities and carry out necessary on-site visits (ideally unannounced). Increasingly, however, commissions are being given powers that extend well beyond those mentioned to include powers of subpoena, search and seizure powers, and in some cases, witness protection. The conferral of such powers must be carefully balanced against the need to preserve the non-judicial character of the commission process. Each addition of such powers moves the process further away from that of a truth commission towards a court process.”⁸²

Recommendation: The Commissions of Inquiry Act offers sufficient powers to summon witnesses but does not proffer search, seizure or witness protection powers. These latter powers cannot, in my view, be vested in a commission under the Act but the commission to establish a Truth Commission should include powers to visit any government premises without notice and should also include directions that the Truth Commission can refer matters related to search, seizure and to the police who shall immediately undertake to enforce the lawful directions of the Truth Commission.

7. How long should a Truth Commission operate?

Documentation⁸³ indicates that the duration of operation of prior truth commissions varied between 7 months (Uruguay) and 9 years (Uganda, 1986). Freeman and Hayner conclude that, “past experience indicates that a time frame of 1-2 years of operation is generally desirable.”⁸⁴

Hayner notes, "For a variety of reasons, it is important to keep a truth commission's tenure relatively short; one year to two and one-half years is probably optimal. Outlining a work plan, collecting and organizing documentation, receiving and processing testimony from thousands of victims, selecting representative cases and completing investigations, and finishing a final report within the allotted time will be difficult even in two years' time. The advantages of finishing quickly are worth the possible sacrifices of investigations cut short, however. It is useful for the report to come out while there is still the momentum of transition under way, when a spirit of reconciliation may still be in the air and recommended reforms are more likely to be implemented. A truth commission cannot hope to document or investigate everything that falls within its mandate; it must choose a few sample cases for investigation and only summarize the rest...Despite the restrictions of a short deadline for completion, the alternative is worse. The Commission of Inquiry set up in Uganda in 1986 was given no time limit; it took over nine years before it was finished, by then losing the interest and support of the public. On the other extreme, the Salvador commission found that finishing its work in six months was impossible; luckily, it was able to obtain a two-month extension."⁸⁵

Hayner also makes a vital observation: "Many past truth inquiries have suffered from the same problem: they have lost much time in administrative and logistical preparations, which have cut significantly into their stipulated operating time. Essential activities such as renting and furnishing an office, hiring staff, and creating or adapting a data base program, as well as larger tasks such as raising funds and designing a public outreach program, can easily consume months of a commission's time before it even begins to take testimony or start investigations...Those establishing future commissions should avoid this pitfall by mandating an explicit setup time, a period of perhaps three to six months, before the commission's operational clock begins. During this period, resources, support, and international consultation may be made available to assist in the commission's preparations."⁸⁶

Recommendation: The Truth Commission should be given a 2-year period of operation with a six-month start-up period allowed before its official operational clock begins ticking.

8. Staffing a truth commission

There is a need for a truth commission to seek to employ "persons with the experience, know-how and emotional wherewithal to handle the subject matter...Because of the breadth of its work and the nature of its responsibilities, a commission requires a wide range of expertise. In addition to human rights lawyers and investigators, a commission may need social workers or psychologists, computer and information-systems specialists, data coding and data-entry staff, logistical coordinators, interpreters, and security personnel. Some specialized expertise that is resource intensive and needed only on a short-term basis can best be obtained through consultancy arrangements with outside experts."⁸⁷

An illustrative experience is reported by Hayner: "The truth commission in Argentina began its work with staff seconded from the Ministry of Interior, but these civil servants didn't last long. They had no experience working in human rights and had never before heard the horrific kinds of stories that the commission was to collect. When they began to take testimony, they quickly broke down in tears, emotionally distraught. Seeking (the right) persons...the commissioners hired staff straight out of national human rights organizations, a decision that they say was critical to the commission's success."⁸⁸ In this respect, it may sometimes have to hire international staff where there may be human capital gaps locally.

Pheroze Nowrojee points out: "I see an effective TRC needing to include in it a Medical Practitioner with experience of torture, a Lands Office registrar, a Magistrate, and a Special Government Liaison Person. The function of such a liaison person will be to open up government files and reports, and to overcome the inevitable hurdles that will be placed to prevent truth being revealed. It has to be a person with access to

State House at the highest levels so that withheld documents, missing witnesses and government officers do after all turn up before the TRC.”

The size of staff has varied from commission to commission. Chile and Argentina, for example, hired 60 full-time staff, Guatemala had 200 at its peak, and South Africa employed 300 between 1996 and 1998.⁸⁹ The size of the truth commission should be based on assessment of the task at hand and advice from human resource management experts to fine-tune this process.

It should not hire people who in the public mind are tainted with past abuses of human rights. Moreover, it will need to ensure that all staff hired are properly trained to adequately handle the mandate, including the psychological stress associated with the task.⁹⁰

Recommendations

1. That the truth commission be given latitude to hire adequate staff to properly execute its mandate
2. That in doing so, the commission be charged to engage the assistance of human resource management expertise
3. That the truth commission be also charged with the training of its staff

9. Period in history to be investigated

As Makau Mutua notes, a truth commission “will not be able to hear every allegation, but must hear the most serious; it must have the power to determine which cases to hear...”⁹¹

Hence, there is a need for the mandate of a truth commission to be specific about which period in history is to be investigated as it tries to rebuild on the basket of truth. Mark Freeman and Priscilla Hayner observe, “The specific span of time the commission is to inquire into should be clear from the start. This is often a controversial aspect of a commission’s mandate, particularly where there is a sense of victimization on the part of both or all sides of a past conflict...The particular span of time will generally be chosen on the basis of those periods in the nation’s history when the worst or the greatest number of violations took place, and accordingly will often correspond to periods of...authoritarian rule. To avoid the appearance of bias, it is generally important for the time span chosen to be consecutive and not broken up to focus only on selected periods in a nation’s history.”⁹²

Recommendation: The Truth Commission must have the mandate to investigate the gross human rights violations and economic crimes committed from 12 December 1963, the day Kenya became an independent republic, to December 30, 2002, the day President Daniel arap Moi handed over power to his successor.

However, the task force needs to interrogate the views it has received during its public hearings to see if there is a demand that abuses perpetrated by the colonial government should also be investigated.

10. Should Commission hearings be public?

Freeman and Hayner note that, “most past truth commissions have not held public hearings. There is, however, an increasing trend to give commissions a mandate to do this. This is the case for new commissions in Peru, East Timor and Sierra Leone...”⁹³

The strengths of having public hearings are well documented: “By giving victims and survivors a chance to tell their story before a public audience – particularly where the hearings are aired on television or the radio

– a commission can formally acknowledge past wrongs, encourage public understanding and sympathy for victims, reduce the likelihood of certain sectors of society continuing to deny the truth, and enhance the transparency of its work. Public hearings can also help to shift a truth commission's focus from product (i.e., its final report) to process, by engaging the public as audience, encouraging press coverage of its issues over a longer period of time and generally stimulating an authentic national discourse about the past."⁹⁴

In Kenya, the Commissions of Inquiry Act⁹⁵ sets a general rule that the proceedings of a Commission established under it are to be public.⁹⁶ It, however, also vests wide discretion in such a Commission to close its doors to the public.⁹⁷

Recommendation: The advantages of making public the conduct of truth commission hearings are clear. Indeed, an effort should be made to engage the national and international media in the whole exercise. In this regard, Prof. Mutua's proposal that "truth commission proceedings must be carried live on radio and television countrywide"⁹⁸ and its establishment should include the provision that the services of the national Kenya Broadcasting Corporation be engaged to carry out this exercise, is moot.

11. Information management by a Truth Commission

This is an area that has scarcely been explored by most commissions. Hayner writes: "Few commissioners to date have had any experience in data management and analysis, and thus, through no fault of their own, often begin their work with little appreciation for the centrality or complexity of information management, the many, many detailed decisions they will have to make for that system to work well, and the degree to which those information management decisions will determine the quality of the commission's product. While they are a great asset, such systems can also consume a huge amount of a commission's time and staff energy, and should not be set up without a full understanding of what is necessary in order to utilize them well. Virtually every truth commission that has used a sophisticated database has run into serious technical and methodological problems, and these problems have sometimes seemed close to strangling a commission and consuming all its energy. Fine definitions must be discussed and carefully outlined in order to assure accuracy in coding; even the question of exactly what information should be collected and what questions should be asked of deponents will fundamentally shape the results of the commission. A good portion of a commission's staff's energies, certainly over half, can easily be taken up with the detailed work of coding and entering information into the database. Yet, if done well, an exacting information collection and management system will serve as a strong foundation to a commission's final conclusions."⁹⁹

Yet, there may be no need for an elaborate information management system. Hayner observes: "Despite the great benefits, this sophisticated and costly approach may not be appropriate for all commissions and all countries. Some commissions in the future may choose not to use computers for statistical analysis, or may not have the means to do so, and not all that use computers will employ such an advanced system. It is possible to tabulate numbers by hand, especially if the abuses are relatively few (thousands rather than tens of thousands), although many kinds of manipulation of the data will not be possible."¹⁰⁰

Recommendation: The issue of what information management system will be used by a truth commission will need to be seriously addressed at the beginning by commissioners in collaboration with information management experts.

11. Witness protection

The likelihood exists that some potential witnesses at the truth commission will express fears for their security and safety. Yet, there is only the South African experience to borrow from in this regard on how and when a witness protection program operates.

Recommendation: This is another issue that a truth commission should exercise its mind to satisfactorily deal with.¹⁰¹

13. Handling reports of abuse of women

Boraine expresses the concern that whereas “more women came to the Commission than men...it should be emphasized that in many instances women played down their own suffering and spoke about that of their families. Many women had suffered in their own right, having been detained without trial, harassed, assaulted, insulted, raped, and tortured.”¹⁰²

And Hayner warns: “Even with a flexible mandate and the intention of fairly gathering information about all patterns of abuse, a commission may well fail to document certain widely experienced abuses. Perhaps the most commonly underreported abuses are those suffered by women, especially sexual abuse and rape. Many commissions have received far less testimony about sexual abuse than in the numbers or proportion that they suspected took place.”¹⁰³

There are several cultural and social reasons for this¹⁰⁴but what is needed are mechanisms to address it. In Haiti, the terms of reference of the truth commission directed it to pay attention to “crimes of a sexual nature against female victims that were committed with political ends.”¹⁰⁵

Other strategies too have been suggested. “Truth commissions should also make female statement-takers available to female deponents, in order to put women more at ease in reporting sexual abuse and should offer confidentiality to victims who don’t want their names to appear in print. In some countries, women might also be more willing to report sexual abuse to non-nationals, whom they might feel less risk of running into in their everyday lives...”¹⁰⁶

Hayner warns again: “Yet despite these special measures, a commission should not assume that the statements it has collected on certain crimes are representative of the total numbers. While women may choose not to speak out, the practice of rape and other sexual crimes should be fully acknowledged in a commission’s report where it is believed such a practice was widespread. If a truth commission does not take special care in addressing this issue, it is likely that it will remain largely shrouded in silence and hidden from the history books – and also likely that few policy, educational, or reparatory measures will be put in place to assist past victims, increase the public understanding of the issue, or reduce the prevalence of sexual abuse in the future.”¹⁰⁷

Recommendation: Special attention should be put on the issue of abuses on women with the truth commission’s mandate specifically spelling out how to deal with crimes of a sexual nature. The truth commission should also be charged with implementing policies, within all its functions, that are sensitive to crimes of a sexual nature and specifically exposing this genre of abuse in its final report.

15. Standard of proof (amount/quality of evidence required)

Hayner states that “a commission must also establish how much evidence is required for it to make a finding, and what standard of proof must be met...Future commissions should state clearly in their reports the amount or quality of evidence that backs up their findings (such as one or two primary or secondary sources), as well as what level of certainty their findings represent.”¹⁰⁸

Different past truth commissions have required different amounts/qualities of evidence. El Salvador, for example, “established a two-source rule, requiring two credible and independent sources as confirmation of a fact.”¹⁰⁹ The South African commission in contrast “required only one source, both for corroborating victims’ accounts and for deciding the culpability of perpetrators, provided the source was sufficiently compelling.”¹¹⁰

Moreover, Hayner notes, “the emerging standard for commissions is to rely on a ‘balance of probabilities’ standard (in some countries called preponderance of evidence), which means that there is more evidence to show something to be true than not to be true.”¹¹¹

Recommendation: The amount or quality of evidence as well as the standard of proof required should be clearly stated in the commission of the truth commission and its report.

16. The question of amnesty: Truth v Justice?

Charles Manga Fombad¹¹² observes that “whilst the South African TRC amnesty process today serves to highlight the difficulties of constructing an amnesty process that complies with international law, the Sierra Leonean experience shows that a blanket amnesty on its own will not, as many had thought, make a peaceful solution to the bitter internecine conflict easier.”

The question of granting amnesty is often a controversial subject.¹¹³

In her paper presentation in March 2003, Hayner warns: “There is a tendency in many parts of the world to think of the South African Truth and Reconciliation commission as the typical example of a truth commission, and especially to think of its amnesty-granting powers as representing a core element of a truth commission exercise. This is not correct. I would like to stress, in fact, that the South African truth commission was very different from most truth commissions to date, in very important ways, and should not be thought of as the typical (or even optimal) model. Most importantly, let me note that there have been about 25 truth commissions in existence to date, over the past twenty years or so, and only the South African truth commission has had such power to grant amnesty to perpetrators. (A model of community-brokered restorative justice which avoids prosecution for low level perpetrators is in place with the East Timor truth commission, but this is not the provision of amnesty, per se.) All other truth commissions have focused their energies on listening to victims, investigating the patterns and practices of the past, making conclusions about institutional and sometimes individual responsibilities, and publishing a report that outlines the causes and consequences of past rights violations – but with absolutely no powers to either grant immunity from prosecution to perpetrators, nor to take any other judicial action in the courts. (Some have, however, recommended judicial action, which I will describe below.) Furthermore, I should note that the ICTJ has strongly recommended that other countries *not* include an amnesty-granting power within a new truth commission, in contexts where such an amnesty power was initially proposed (such as Ghana and Indonesia).¹¹⁴

The problem with amnesties is that they “generally violate the right of victims to redress and will generally be inconsistent with a state’s obligation under international law to punish perpetrators of serious human rights

crimes. They can also subvert the rule of law by allowing only certain groups of perpetrators to escape liability. They can undermine both specific and general deterrence, and promote cynicism and disillusionment among victims of human rights abuses, which in turn could cause them to take the law into their own hands and embark on acts of private vengeance.”¹¹⁵

Put in different words, “here is the deep moral problem of the truth commission as a substitute for the criminal justice system: It short-circuits the mechanisms most societies have established to right wrongs by punishing wrongdoers. And if the South African commission was to compensate victims with money...who can say that money substitutes for justice? Why does anyone have the right to tell that woman, or Griffiths Mxenge’s family, that the murderers of their loved ones must go free?”¹¹⁶

To understand this moral conundrum, one has to understand the background of amnesties. Aryeh Neier, author of the book, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice*,¹¹⁷ explains: “The historic idea of amnesty was that amnesty was a prerogative of the state and it was something that the state could do because some had injured the state...Therefore the state, having been the victim of the crimes they committed, had the power to forgive those who took up arms against it...Now in the Latin American context, and in the South African context, amnesty is quite different. In the Latin American context, amnesties became popular after General Pinochet issued an amnesty in 1978...The amnesty, however, applied principally not to those who took up arms against the government; rather it applied to Pinochet’s own forces. It applied to those who had committed crimes against the citizenry in Chile...It seems to me that this turns upside down the historic justification for an amnesty. Rather than an act of forgiveness for those who have sinned against the government, it becomes a legitimization of the government’s sins against the population. Amnesties of that sort...do not deserve the legitimacy that we accord to amnesties that we know historically.”¹¹⁸

Freeman and Hayner, however, still argue that a truth-for-amnesty arrangement can be defensible where: (a) the commission’s power has been given reasonably democratically; (b) amnesty is given on an individual, not class, basis; (c) a form of public procedure is imposed on its recipients; (d) victims are given an opportunity to question and challenge an individual’s claim to amnesty; and (e) reparation payments are made to victims. An amnesty’s scope can also be narrowed by making the grant of amnesty reversible following the commission of a new and similarly grave offence.”¹¹⁹

The reasons for granting an amnesty have to be understood in the political context. Boraine notes: “The possible granting of amnesty was based not on legal nor on the human rights argument, but on a political decision...”¹²⁰ Boraine further argues that it represents “a negotiated settlement, a political compromise” and states that it is “morally defensible to argue that amnesty is the price South Africa had to pay for peace and stability.”

Obviously, this is not the situation obtaining in Kenya. There is no visible or concrete reason to go the amnesty way here. It is not unthinkable that a truth commission in Kenya could be used in tandem, rather than as an alternative, to criminal prosecutions here. This would serve both to clarify the “broader historical perspectives” and “deliver mere judgments in isolated cases.”¹²¹ Indeed, as Aryeh Neier has asserted, ‘truth commissions...do serve an enormously important purpose, but it doesn’t seem to me that they necessarily have to be accompanied by amnesties.’¹²² This would allow for the “creation of a historical record while also leaving open the possibility of future judicial resolution.”¹²³

Recommendation: Given the more open political environment and the fact that a truth commission would have wide summoning powers, there seems to be no compelling reason to vest amnesty powers in a truth commission in Kenya and this power should not be available for exercise.

17. The danger of retraumatization/secondary traumatization

There is always the danger that those recounting their past experiences could suffer retraumatization, “which may be so severe as to result in a multitude of debilitating physical symptoms, such as confusion, nightmares, exhaustion, loss of appetite, and sleeplessness.”¹²⁴

Indeed, there is also a danger that a truth commission’s staff could also suffer trauma (secondary trauma) while documenting past abuses of human rights because they are “sponges” absorbing grief, pain and trauma of the stories they hear.¹²⁵ A stark example of just how emotionally moving the experience can be is related by Alex Boraine: “He was silent for a while and then tried to describe a particular method of torture known as ‘the helicopter’, which involved suspending the victim upside down from a wooden stick and beating and kicking him in the process, often until he was unconscious. Revisiting this experience was too much for Malgas and he broke down and cried. It was too much for Desmond Tutu, who put his head on the table and sobbed.”¹²⁶

Additionally, Boraine notes: “We also faced the trauma of listening to, and in some cases taking upon ourselves, the grief, the horror, and the pain of victims and survivors. Several of the commissioners and many of the staff sought counseling at trauma centres and from the resources within the commission itself.”¹²⁷

Those who were not members of the South African Truth and Reconciliation Commission but directly worked with it were also similarly affected. Boraine observes that “many of the journalists became personally involved, and were deeply affected by what they had to listen to in order to write their stories and present their programmes. Many of them were disturbed, emotionally, mentally and spiritually. On more than one occasion, Tutu and I met with the regulars in off-the-record meetings. There they opened their hearts, hard-bitten journalists though they were, and told us of their own feelings and of their own experiences and trauma.”¹²⁸

Hence, there is a patent need for follow-up psychological support and counseling. In South Africa, the commission hired four mental-health professionals on its staff to “ensure that the commission was psychologically sensitive to trauma.”¹²⁹

Recommendation: The truth commission should pay due attention to the danger of retraumatization and secondary traumatization by engaging mental-health professionals on its staff.

18. The issue of reconciliation

It has been stated that “while the truth may not always lead to reconciliation, there can be no genuine, lasting reconciliation without truth.”¹³⁰ And whereas, it is true that there can be no reconciliation without truth, it is also equally true that truth-telling can also lead to bitterness, resentment and cleavages in society. Hence the need for a truth commission to be alive to the dynamics of reconciliation as it exercises its mandate.¹³¹ Indeed, it should take heed to Amy Ansell’s words that, “While it is no doubt useful and beneficial to learn more facts about what happened and who is responsible for past crimes...the link between this process and the objectives of reconciliation in justice is less certain.”¹³²

It should be clear from the outset that “...a single commission made up of a handful of Commissioners and a dedicated staff cannot on its own achieve the reconciliation that is so desperately needed...”¹³³ Boraine asserts that, “there is no quick-fix for the healing of a nation; there are no magic formulae which will instantaneously remedy the sickness that reached epidemic proportions over many years and left thousands

of victims in its wake. The healing of a nation cannot be achieved merely by holding a conference or several conferences. Nor can genuine relief be obtained in the writing of books or even through the appointment of a Truth and Reconciliation Commission! Discussion, debate, analysis and the recording of the truth can be a significant part of the healing process, but only that. The wounds incurred in the long and bitter period of repression and resistance are too deep to be trivialized by imagining that a single initiative can bring about a peaceful, stable and restored society.”¹³⁴

He proceeds to note: “Reconciliation...is not a sure-fire escalator which takes one consistently and steadily to new heights. It is a process of fits and starts, of going forward and going back, of reaching heights and plumbing depths...Reconciliation without the anchor of restitution is not merely false reconciliation, not only a travesty of justice...”¹³⁵ Boraine continues to add that “while reconciliation is a worthy and necessary goal, it is an endless pursuit and cannot be achieved instantly or comprehensively.”¹³⁶ Without victims seeing real material transformation in their lives, Archbishop Tutu has warned, “you can kiss reconciliation good-bye.”¹³⁷

Hence, there is a need to understand and fully appreciate the complexity of reconciliation. As advocate Richard Penwill observes, “Effective reconciliation is a process which requires confronting the truth and thereafter aiming at bridging differences, healing and understanding.”¹³⁸

Hayner reports that, “the degree of emphasis on reconciliation as a goal of truth-seeking has varied greatly among commissions. Not all have framed their work around this goal, but those that have – such as the Truth and Reconciliation Commission in South Africa and the National Commission on Truth and Reconciliation in Chile – have found it to be a difficult mission...There should be a distinction between individual reconciliation and national or political reconciliation. The strength of a truth commission is in advancing reconciliation on a national or political level. By speaking openly and publicly about past silenced or highly conflictive events and by allowing an independent commission to clear-up high profile cases, a commission can ease some of the strains that may otherwise be present in national legislative or other political bodies. An official accounting and conclusion about the facts can allow opposing parties to debate and govern together without latent conflicts and bitterness over past lies...On an individual level, however, reconciliation is much more complex, and much more difficult to achieve by means of a national commission. There certainly are examples of truth commission processes leading directly to healing and forgiveness for some individuals, but knowing the global truth or even knowing the specific truth about one’s own case will not necessarily lead to a victim’s reconciliation with his or her perpetrators. Forgiveness, healing, and reconciliation are deeply personal processes, and each person’s needs and reactions to peacemaking and truth-telling may be different.”¹³⁹

Recommendation: The commission of the Truth Commission should mandate it to promote national reconciliation and healing and to undertake such activities as to achieve this end. But there should be no expectation that the Truth Commission will bring total reconciliation in Kenya.

19. Reparations

“Victims ask practical questions: Will the TRC give us back our land? Will the TRC give us compensation? Or help us get compensation? Will we get compensation from the Government or from the alleged perpetrators? There must be guidance on this even if a TRC is not the medium by which reparations are effected.”¹⁴⁰

Hayner observes that, “international law clearly establishes an obligation on the part of the state to provide redress for abuses by state forces. As stipulated in many foundational human rights documents, including regional and international human rights treaties, and confirmed in decisions put forward by international

courts, states must provide reparations to victims of human rights violations. This may take many forms that go beyond the payment of cash to the injured. *Reparations* is a general term that encompasses a variety of types of redress, including *restitution*, *compensation*, *rehabilitation*, *satisfaction*, and *guarantees of nonrepetition*. Restitution aims to reestablish to the extent possible the situation that existed before the violation took place; compensation relates to any economically assessable damage resulting from the violations; rehabilitation includes legal, medical, psychological and other care; while satisfaction and guarantees of nonrepetition relate to measures to acknowledge the violations and prevent their recurrence in future. Usually a mix of these types of redress is appropriate.¹⁴¹

While a state will most likely be unable to compensate each and every victim or survivor of human rights abuses to the extent of their suffering or injury, an attempt needs to be made to put in place a reparations program to address their needs.

In this regard, it has been noted that truth commission records be made the source on which to build a reparations program since it has been established as being unable “to provide a final list of recommended recipients, nor to outline the specifics of a reparations program.”¹⁴² Indeed, it has been further observed that a truth commission “can better make recommendations and an overall assessment of need, which can serve as the beginning point for the development of a substantial reparations program to follow.”¹⁴³

There are several challenges while fashioning a reparations program. There is the question of whether that program is fair and inclusive. How, for example, is the loss of a loved one quantified? Should all the victims receive equal compensation, even if some suffered more? And, on the other hand, if there are distinctions made between victims, it quickly becomes difficult to categorize degrees of suffering or loss. Another difficulty is in regard to the implementation and administration of a reparations program as this could easily overload a truth commission as happened in South Africa. Moreover, the “truth” may be skewed if the commission’s mandate includes the task of awarding or recommending reparations as some victims will embellish their depositions in order to receive compensation.¹⁴⁴

Recommendation: Hayner’s advice is worth reiterating: “The best path to follow is...for a truth commission to provide general recommendations for a reparations program, and perhaps a general assessment of need, but to leave the details and implementation of a program to a post-truth commission body, allowing the commission to concentrate its time on broader investigations and conclusions.”¹⁴⁵

20. The resource question

A truth commission will need adequate material and human resources. With the exception of the truth commissions in South Africa (over USD 35 million) and Guatemala (between USD 5 to 35 million),¹⁴⁶ truth commissions have all been less than USD 5 million.¹⁴⁷ However, it is observed that as the terms of reference of truth commissions have become increasingly sophisticated, the average budget of new commissions has risen to USD 5-10 million.¹⁴⁸ Funding is derived from both government as well as funds from donor states and private foundations. Office space and equipment are generally provided directly by the national government.¹⁴⁹

Recommendation: The commission of the Truth Commission should allow it to source funding from government, donor states and private foundations provided that it has to declare all these sources, the amounts involved and it will publicly account for all the resources it receives.

21. Relationship between a truth commission and a concurrent judicial investigation

There may be occasions where an issue before a truth commission could also be before a concurrent or ongoing judicial investigation. Indeed, in Kenya, the issues before the Goldenberg Commission of Inquiry and the Presidential Commission on Land will most likely also be relevant to the work of the Truth Commission.

There will need to be an established practice so that there is a dual carriageway of information to all concurrent judicial processes. In South Africa, Hayner says, “where there was an overlap in cases investigated by a prosecutor’s office and by the truth commission’s amnesty committee, the flow of information...went from the office of the prosecutor to the truth commission. The official policy of the South African attorney generals’ offices was to allow the commission staff to look at its files and take notes from its documents, although commission staff cite occasions when access was delayed or important documents were held back. Meanwhile, prosecutorial staff attended some of the commission’s amnesty hearings in hopes of learning information useful to its cases, pertaining either to the applicant, in case the amnesty application were to be denied, or to other persons named.”¹⁵⁰

Recommendation: The commission of the Truth Commission should require it to enter into open collaboration with other relevant judicial investigations.

22. Naming names

There are two contending principles on the issue of naming names in a truth commission’s report. Firstly, there is a due process requirement that those who are accused of crimes be given an opportunity to defend themselves before being pronounced guilty. Given that a truth commission does not have strict legal strictures to follow in its proceedings, this principle is likely violated when it names individuals in its report. On the other hand, telling the truth requires naming of individuals who are responsible for rights abuses.

In answering this tussle, Freeman and Hayner assert: “Past experience seems to suggest that the best practice is to allow commissions to name names but ultimately leave it at their discretion whether or not to do so...As to due process entitlements that should apply, it seems that at a minimum persons who might be named should be (a) informed without undue delay of the allegations against them and of the intention to name them in a public report, and (b) given the opportunity to respond to the evidence against them and offer a defence, but not necessarily through oral hearing.”

Recommendation: The commission of the Truth Commission should allow it to name names of those it holds responsible for abuses at its discretion where it has fulfilled the two conditions stated above.

23. The question of follow-ups

Hayner notes that, “it is clear, however, that the record of implementation of truth commission recommendations has been among the weakest aspects of these commissions to date. With no power of enforcement, and often with no official body to watch over and promote the recommendations of a truth commission after it submits its report and closes down, many countries have seen a fine list of recommended reforms receive very little governmental attention. There may be ways to improve this record in the future. The legislation for the Truth and Reconciliation Commission in Sierra Leone, for example, in addition to committing the government to implementation of its final recommendations, calls for the creation of a follow-up committee to track their implementation, and requires the government and the follow-up committee to make public quarterly reports on the progress made.”

This observation suffices.

Recommendation: The task force needs to inform the Minister of this concern and strongly urge the government to commit itself publicly at the outset to forming an independent, inclusive body that will superintend over how the recommendations of the truth commission are implemented and make quarterly public updates of its findings.

24. The question of economic crimes

Makau Mutua advises that, “economic crimes, such as the looting of the public purse, land-grabbing, public corruption, and the transfer of stolen public funds into personal bank accounts off shore must be investigated without delay.”¹⁵¹ In contrast, Priscilla Hayner states: “A question that would logically be raised in Kenya, around the discussion of a truth commission, is whether it makes sense for economic crimes to be included in a commission’s mandate, along with human rights crimes. The International Center for Transitional Justice recently considered this question in some depth, knowing that it would likely and logically emerge in a number of contexts, including Kenya. Based on our general experience watching truth commissions operate in various countries around the world, we came to the general conclusion that it is preferable to separate any inquiry into corruption and economic crimes from a broad inquiry into human rights violations. We have set out our reasoning for this conclusion in a separate paper, which is available to those interested.”¹⁵²

There are several arguments in support and against the inclusion of the investigation of past economic crimes in the mandate of a truth commission.¹⁵³ In supporting the inclusion of economic crimes, it has been noted that:¹⁵⁴

- Addressing corruption is central to addressing the fundamental problem of impunity, especially where it has been as widespread as it is in Kenya.
- Corruption, especially in the judiciary, can be directly linked to rights violations in the past, and therefore it is logical to link them together in one investigating body.
- The public is rightfully outraged at past economic crimes, and in fact one can argue that economic crimes were more widespread and directly affected more people than did human rights violations. Thus, excluding corruption may seem to leave out some of the more important aspects of the past regime’s abuses.
- Some politically-motivated crimes straddle the two worlds, such as land grabs and displacement that occurred in the context of ethnic clashes that were instigated for political purposes. It would be difficult for the commission to avoid addressing the economic or material side of these events (theft, displacement, loss of property).
- While there are a number of individual inquiries underway in Kenya pertaining to specific cases of massive economic fraud, there is no single overview investigation to paint the big picture. This could, theoretically, be done by a truth commission in a useful way. On the other hand, if it is excluded from the commission’s mandate, then perhaps there should be a separate inquiry into the breadth and full nature of economic crimes under the prior regime. A parallel inquiry, or a permanent anti-corruption body that in part looked at the pattern of past abuses, might be a healthy complement to a human rights-focused truth commission.

- Even if a commission did not do a thorough and in-depth investigation into corruption and economic crimes, it might be able to provide a general picture, and to point to the need for further investigation – into key departments, offices, individuals, or practices. It may also be able to identify those areas where corruption is most likely to be continuing, and where firm action is needed – as well as those areas such as the police and judiciary where corrupt practices prevent justice of all kinds, and where the protection of rights must depend on functioning services. (But of course, some of this might naturally be part of a truth commission's inquiry into lack of justice for rights crimes.)
- Including economic crimes within the mandate of a truth commission would be an interesting way to start to get at economic, social, and cultural rights that are generally excluded from the focus of truth commissions. When these crimes are massive, is there an argument for trying to address them?

However, it has similarly been strongly argued that the inclusion of the investigation of economic crimes in the mandate of a truth commission would be counterproductive because:¹⁵⁵

- *Breadth of investigation:* A truth commission's task would be considerably larger if it had the dual task of investigating rights abuses and economic crimes. The forms and levels of corruption have been so great, in societies such as Kenya, that virtually all public offices and departments would require investigation in some form. Bribes given to police on the street; reports of judges auctioning off their decisions; huge levels of theft by government officials of public coffers – these and other elements could and probably should be addressed in any decently thorough inquiry.
- *Size and capacity of commission:* There is a risk that the staff size and budget of the commission would not be significantly larger to accommodate the huge increase in workload for the commission. This would thus strain the resources that are available for investigations into rights abuses.
- *Distraction from human rights violations?* It is possible that a close look into the scandalous levels and forms of corruption that were taking place under the prior regime may distract the public's attention from the commission's inquiry into torture, killings, illegal detention, and politically-motivated ethnic clashes. This may or may not be true, however – it may be equally possible that the full picture of both types of crimes and impunity will bring greater attention to the overall nature of the past regime and the depth of impunity.
- *A different set of investigative skills?* Investigating corruption would seem to require an entirely different pool of investigators, who would have the skills, experience, and wherewithal to look into the shady world of economic crimes and grand theft.
- *Methodologies of a truth commission:* Some of the typical methodologies of a truth commission – such as taking individual statements from “victims,” trying to get a handle of the total numbers of abuses that took place, and holding public hearings – do not seem to match well with the kind of commission that would work on corruption. On the other hand, other typical methodologies do fit well – such as trying to investigate some cases at greater depth in order to paint the big picture, and drawing conclusions as to the kind of institutional reform that would be necessary to prevent repetition in the future. It would seem that it would be necessary to develop a corruption “branch” into the structure of the truth commission, which would largely take on a separate kind of investigation. Would it be useful to take individual statements, or to hold some public hearings on

economic crimes? It may be – although it might be harder to find individuals who witnessed corruption within state structures but who did not take part in that same corruption. And virtually every Kenyan, apparently, could tell numerous stories about the bribes and corruption that were part of their daily life.

- *Sufficient time?* Would it be possible to undertake a serious inquiry into matters that could require access to bank accounts, tracking international flows of money, reviewing the details of company records, etc.? It may be just impossible to get a full handle on the extent of the problem in a short-term inquiry.
- *Reparations?* It is possible that including both areas in a truth commission's mandate could cloud the demand for reparations for rights violations. If everyone has been the victim of state corruption, and that is reported on equally with the rights abuses, then does that diminish the argument for reparations for the physical (over the economic) abuses that took place?

Hayner and Bosire observe that, “most truth commissions in the past (of the more than 25 truth commissions that have existed to date) have excluded economic crimes from the terms of reference. Only the commission in Chad tried to fully cover both human rights and economic crimes (see annex for description). Other commissions, such as in Nigeria and Ghana, have not focused on corruption in depth, but have received testimony when it was seen to be part of a broader human rights violation, such as a person being detained in Ghana and their house and property simultaneously being taken away by the state. This is a natural link, and provides an example of a possible approach for Kenya.”¹⁵⁶

Which way Kenya?

Recommendation: The investigation of past economic crimes should be included in the mandate of the truth commission. It would represent such a yawning gap in the record of truth of Kenya should it be excluded that it would be advisable rather to face the challenge of managing it. The question should not be about if it will be done, but how it will be done.

Turning to the logistical aspect, and in recognition that this mandate includes a significant additional workload, the truth commission should be charged with organizing itself into two chambers, one to look into past gross violations of human rights abuses and another to deal with past grave economic crimes, which should then organize different but harmonious work plans and operational schedules.

25. Principal activities of a truth commission

These include outreach, statement-taking, research and investigation, data processing, public hearings, emotional support, and the final report.¹⁵⁷

The nature and extent of a commission's outreach will “profoundly affect its access to information, its effectiveness in addressing the needs of victims, its ability to manage public expectations and its general reputation in the eyes of the public. Some of these efforts can be carried out directly by the commission through holding public meetings and through the preparation, publication and dissemination of pamphlets, videos and publications in popular form about the role and mandate of the commission. The commission can also achieve its outreach goals by engagement with and effective use of NGOs, local grass-roots organizations and the media.”¹⁵⁸

Statement-taking is normally done through “private, closed-door meetings, usually by commission staff taking testimony from individual victims in one-to-one encounters...(it) typically involves both a meeting and the filling out of a statement form by the deponent. Statement-taking is important in at least two ways: it furthers the goal of establishing the truth about the past; and it provides an opportunity for victims to come forward and recount their traumatic experiences in a sympathetic and generally safe environment.”¹⁵⁹

Research units “tend to be relatively small but staffed by persons with strong research skills and familiarity with national think tanks, NGOs, local archives and other key sources of information. In contrast, investigative units may include people with legal backgrounds or even experience in law enforcement. Many truth commissions combine research and investigation into one department...”¹⁶⁰

Recommendation: Since truth commissions deal with large volumes of information, it must be properly “organized and systematized. This requires...an effective database for the storage, organization and retrieval of records and data. Generally speaking, commissions which do rigorous data collection and analysis will be better able to defend their findings on scientific grounds. A strong data management system will help arrive at a “big picture” analysis of historical patterns...In terms of staffing, commissions should hire a programmer to write and maintain basic software and to extract the data in formats appropriate for analysts. They will also need professional statisticians (or social scientists fluent in statistical methods) to review the data before it is published, and a team of data processors to input all the information received by the commission.”¹⁶¹

Mark Freeman and Priscilla Hayner say that “final reports have often constituted the enduring legacy of commissions and have also been used as a resource for human rights education or for subsequent prosecutions. If they are well documented and methodologically sound, final reports can serve as a critical guard against revisionism. In many ways, however, the impact of a final report may depend less on its content than on a variety of surrounding factors, including when and how the report is publicized, how widely it is distributed, how much coverage it receives in the media and whether there are both traditional and alternative presentations of the findings...final reports usually contain a section on findings and a section on recommendations. The findings section will typically identify the causes and patterns of past violations, as well as the victims of those violations. In some cases, individual and/or institutional responsibility for violations may also be reported...recommendations (are) aimed variously at providing assistance or redress to victims, making necessary constitutional, legal and institutional reforms in order to prevent future relapse into war or authoritarian rule, and facilitating the consolidation of democracy and the rule of law. In many cases, commissions have also made recommendations for follow-up measures to ensure their timely and effective implementation.”¹⁶²

Recommendation: The terms of reference of the truth commission should specifically include all these principal activities.

Moreover, the commission should require the truth commission to make its findings and recommendations public within 30 days of submitting its final report to the President.

RECOMMENDATIONS

1. The task force should use its reading of the public mind, based on its public hearings, to recommend whether or not Kenya should establish a Truth Commission.
2. Should it recommend the establishment of a truth commission in Kenya, the task force should also recommend the use of the Commissions of Inquiry Act to establish a truth commission in Kenya.
3. The task force should, following wide local and international consultations, develop the terms of reference of the truth commission for submission to the Minister in its report.
4. The terms of reference of the truth commission should be sufficiently broad and flexible to allow investigation into all forms of human rights abuses and economic crimes by the previous governments, their officials, employees, servants or agents during the period in the past that it concludes from its public hearings requires investigation.
5. The task force should outline but not limit the incidents/ events/occurrences that the truth commission should investigate.
6. The task force should, following wide local and international consultations, develop criteria for the appointment of commissioners to the Truth Commission.
7. There should recommend not more than 11 commissioners for the truth commission; three of whom shall be non-citizens who have the requisite stature, experience and expertise to undertake the duties required of a truth commission. No less than one-third of these members shall be women.
8. The task force should, following wide local and international consultations, suggest names of those it deems to merit appointment to the Truth Commission.
9. The establishment of the truth commission should guarantee its independence and from the direction of any individual, group, authority or agency.
10. In addition to the powers proffered to the truth commission by the Commissions of Inquiry Act, the commission establishing a truth commission should also include powers to visit any government premise without notice and, additionally, require the police to enforce any lawful directions of the truth commission with regard to search and seizure.
11. The truth commission should be given a 2-year period of operation with a 6-month start-up period allowed before its operational clock begins to tick.
12. The truth commission should be given latitude to hire its own staff in consultation with human resources experts.
13. The truth commission should be charged to train its own staff.
14. In addition to the requirement under the Commissions of Inquiry Act that it conducts its hearings in public as it deems fit, the commission of the truth commission should require the public broadcaster to provide live radio and television coverage under the direction of the Truth Commission.
15. The truth commission should be charged to design and develop an information management system that will be suitable for its needs and purposes.
16. The commission of the truth commission should require it to pay special attention to abuses of a sexual nature, and require that it shall act with due sensitivity and regard when investigating and exposing this genre of abuse.
17. The commission of the truth commission should state the amount or quality of evidence as well as the standard of proof required.
18. The truth commission should be charged to pay due attention and care to trauma among witnesses and staff and employ permanent psychological expertise to address this issue.
19. The truth commission should be charged with promoting national reconciliation while undertaking all its functions and also be required to undertake activities that enhance social and political reconciliation.
20. The truth commission should be required to provide general recommendations for a reparations program, and a general assessment of needs for reparations. The truth commission should be

- allowed to source its own funding from government, donor states, and private foundations provided that it declares all sources of its funding and the amounts involved. It should also be required to publicly account for all funds and other material/human resources it has received.
21. The truth commission should be charged with entering into open, professional collaboration with any relevant judicial investigation.
 22. The truth commission should have the discretion to name names of those it deems responsible for past abuses as per its mandate provided that it has made adequate provision for those named to make a defense as provided for under the Commissions of Inquiry Act.
 23. When submitting its report to him, the task force should seek a public commitment from the Minister that the government will form an independent, inclusive body to oversee the implementation of the recommendations of the truth commission and make its findings publicly known on a regular (quarterly) basis.
 24. The terms of reference of the truth commission should include the functions of outreach, statement-taking, research and investigation, data processing, public hearings, emotional support, and the final report.
 25. The commission of the truth commission should require it to make its findings and recommendations public within 30 days of submitting its final report to the President.
 26. The commission of the truth commission should include a mandate to investigate past economic crimes.
 27. The commission of the truth commission should charge it with organizing itself into two: one chamber to investigate past gross human rights violations, and another to investigate past grave economic crimes.
 28. The truth commission should be allowed to co-opt expertise from non-members when it considers appropriate and so long as no policy decisions are made by those non-members.

¹ See Kevin Avrunch and Beatriz Vejarano, *Truth and Reconciliation Commissions: A Review Essay and Annotated Bibliography* as published on www.trinstitute.org/ojpcr/4_2recon.htm

² Priscilla Hayner is indubitably one of the foremost students of truth commissions worldwide and I would strongly recommend all task force members to acquaint themselves thoroughly with her book, *Unspeakable Truths: Facing the Challenge of Truth Commissions*. This book is a vastly informative review of 21 previous truth commissions. By the time of its publication, Hayner had spent at least seven years studying truth commissions. She is currently the Program Director of Research and Technical Assistance at the International Centre for Transitional Justice (ICTJ)

³ Priscilla Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, New York, Routledge, 2001

⁴ Mark Freeman and Priscilla Hayner, "Truth Telling," in International IDEA, *Reconciliation after Violent Conflict: A Handbook*, Stockholm, Bulls Tryckeri AB Halmstad, 2003, pp. 122-139

⁵ The issues of transitional justice and truth commissions have been analysed in many books, book chapters as well as articles. These include Asmal Kader, Louise Asmal and Ronald Suresh Roberts, *Reconciliation through Truth: A Reckoning of Apartheid's Criminal Governance*, 2nd Edition. New York, St. Martin's Press, 1997; Assefa, Hizkias. *Peace and Reconciliation as a Paradigm: A Philosophy of Peace and Its Implications on Conflict, Governance, and Economic Growth in Africa*. Nairobi, Kenya, Nairobi Peace Initiative Monograph Series, No. 1, 1993; Ball, Howard. *Prosecuting War Crimes and Genocide: The Twentieth Century Experience*. Lawrence, Kansas, Kansas University Press, 1999; Boraine, Alex and Janet Levy, (Eds.), *The Healing of a Nation?* Cape Town, Justice In Transition, 1995; Boraine, Alex, *A Country Unmasked: South Africa's TRC*, New York, Oxford University Press, 2001; Borris, Eileen R. and Paul F. Diehl, "Forgiveness, Reconciliation, and the Contribution of International Peacekeeping," in Langholtz Harvey J., (Ed.). *The Psychology of Peacekeeping*. New York: Praeger Publishers, 1998; Christie, Kenneth, *The South African Truth Commission*, New York, Palgrave Publishing, 2000; Cochrane, James, et. al. (Eds.), *Facing the Truth: South African Faith Communities and the Truth & Reconciliation Commission*. Athens, OH, Ohio University Center for International Studies, 1999; Chubb, Karin, et.al., *Between Anger and Hope: South Africa's Youth and the Truth and Reconciliation Commission*, 2001; Feldman, Lili Gardner., *The Special Relationship Between West Germany and Israel*, Boston, George Allen & Unwin, n.d.; Feldman, Lili Gardner, "Reconciliation and Legitimacy: Foreign Relations and Enlargement of the European Union." In Banchoff, Thomas and Mitchell Smith, (Eds.). *The Legitimacy of the European Union*. New York: Routledge, 1998; Goodman, David, *Fault Lines: Journeys into the New South Africa*. Berkeley, CA, University of California Press, 1999; Hamlin, Bryan T, "Moral Re-Armament and

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- ⁶ Makau Mutua, *Why Kenya Needs a Truth Commission*, Conference paper dated March 28, 2003, p. 2
- ⁷ *Ibid.*, p. 2
- ⁸ Ruti G. Teitel, *Transitional Justice Genealogy*, Harvard Law Journal, Vol. 16, p. 76
- ⁹ Amy Ansell in a contribution to a panel discussion on "Amnesty and Truth Commissions" at an Atrocities Conference. <http://www.bad.edu/hrp/sttrocities/panel6.htm>.
- ¹⁰ Makau Mutua, *Ibid.*, p. 2
- ¹¹ Molly Andrews, "Grand National Narratives and the Project of Truth Commissions: A Comparative Analysis," *Media, Culture & Society*, London, Thousand Oaks and New Delhi, Sage Publications, Vol. 25: 45-65, p. 46
- ¹² Molly Andrews, *Ibid.*, p. 45
- ¹³ *Ibid.*, p. 124
- ¹⁴ *Ibid.*, p. 125
- ¹⁵ In *Why Kenya Needs a Truth Commission*, a conference paper dated 28 March 2003, Professor Makau Mutua avers at p. 2, "...there is no model truth commission anywhere that Kenya can simply mimic or copy. Kenyans should learn from the experiences of all these countries, and decide the type of a truth commission they desire to establish." And in a paper presented at the same conference and titled, *The Truth Commission as an Institution for Transitional Justice: Lessons and Challenges from Other Countries*, Priscilla Hayner observes, "What is most important in any country that is considering a truth commission is that they begin with a blank slate, taking consideration of the various different forms that such commissions have taken in different countries, including different powers, specific mandates for investigation, length of time for operation, period of time which is to be covered in its investigations, etc. But any new truth commission should be crafted to respond to the opportunities, realities, and needs of that particular country. Every truth commission to date has been unique, sometimes in very fundamental ways, and every truth commission that may be created in the future should also be unique, crafted by nationals to fit the needs of the national situation." In *Unspeakable Truths*, *Op cit.*, p. 252, Hayner observes, "there is no one model on how to do this right; creativity and sensitivity to national needs may be the most important ingredients for setting up successful endeavors."
- ¹⁶ Steiner Henry, "Introduction to Truth Commissions," in Steiner Henry and Alston Philip, *International Human Rights in Context: Law, Politics, Morals*, New York, Oxford University Press, 2000 at p. 1218
- ¹⁷ *Ibid.*, p. 1218
- ¹⁸ Mr Murungi was presenting a paper to the National Conference on "A Truth, Justice and Reconciliation Commission for Kenya: Prospects and Obstacles" on 4 July 2002 in Nairobi
- ¹⁹ *Daily Nation*, May 31, 1989
- ²⁰ Timothy Garton Ash, *The File: A Personal History*, New York, Vintage, 1997
- ²¹ Alex Boraine, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission*, New York, Oxford University Press, pp. 6-7
- ²² Colin Bundy, *Remaking the Past*, Department of Adult Education and Extramural Studies, University of Cape Town, 1968
- ²³ Quoted by Alex Boraine a contribution to a panel discussion on "Amnesty and Truth Commissions" at an Atrocities Conference accessible at <http://www.bad.edu/hrp/sttrocities/panel6.htm>.
- ²⁴ Maya Angelou, Inaugural Poem, *The Complete Collected Poems of Maya Angelou*, New York, Random House, 1994
- ²⁵ Hayner, *Op cit.*, pp. 183-184
- ²⁶ Hayner, *Ibid.*, p. 186

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- ²⁷ Hayner, *Ibid.*, p. 201
- ²⁸ See generally David A. Crocker, "Truth Commissions, Transitional Justice, and Civil Society," in Robert I. Rotberg and Dennis Thompson (eds.), *Truth v. Justice: The Moral Efficacy of Truth Commissions: South Africa and Beyond*, Princeton, NJ, Princeton University Press; Charles Manga Fombad, *Peace Building Through Truth Commissions in Africa*, (unpublished article); Mark Freeman and Priscilla Hayner, *Op cit.*, p. 125-126
- ²⁹ Makau Mutua, *Op cit.*, p. 3
- ³⁰ Alex Boraine, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission*, New York, Oxford University Press, p. 291
- ³¹ *Ibid.*, pp. 290-292
- ³² Michael Ignatieff, "Articles of Faith," *Index on Censorship* 25, no. 5 (1996), 113 quoted in Hayner, *Op cit.*, p. 25
- ³³ Hayner, *Op cit.*, p. 25
- ³⁴ Mark Freeman and Priscilla Hayner, *Op cit.*, p. 125
- ³⁵ Hayner, *Op cit.* p. 26
- ³⁶ Molly Andrews, "Grand National Narratives and the Project of Truth Commissions: A Comparative Analysis," *Media, Culture & Society*, London, Thousand Oaks and New Delhi, Sage Publications, Vol. 25: 45-65, p. 49
- ³⁷ *Ibid.*, p. 93
- ³⁸ *Ibid.*, p. 102
- ³⁹ Mark Freeman and Priscilla Hayner, *Op cit.*, p. 126
- ⁴⁰ Hayner, *Op cit.*, p. 42
- ⁴¹ Hayner dedicates a whole chapter of her book to the issue of "Reparations for State Crimes." See Hayner, *Op cit.*, pp. 170-182
- ⁴² Steiner, *Ibid.*, p.1219
- ⁴³ Mark Freeman and Priscilla Hayner, *Op cit.*, p. 126
- ⁴⁴ Hayner, *Op cit.*, p.167
- ⁴⁵ Desmond Tutu, *No Future Without Forgiveness*, London, Rider Books, 1999
- ⁴⁶ Makau Mutua, *Op cit.*, p. 3
- ⁴⁷ *Ibid.*, p. 156
- ⁴⁸ Mark Freeman and Priscilla Hayner, *Op cit.*, p. 127
- ⁴⁹ *Report of the Chilean National Commission on Truth and Reconciliation*, 1993, Vol 1, p. xxiii
- ⁵⁰ Alex Boraine, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission*, New York, Oxford University Press, p. 4
- ⁵¹ Timothy Garton Ash, *The File: A Personal History*, New York, Vintage, 1997
- ⁵² Bruce Ackerman, *We The People: Transformations*, Cambridge, Massachusetts, Harvard University Press, 1991
- ⁵³ Priscilla Hayner, *Op cit.*, pp. 183-205
- ⁵⁴ Mark Freeman and Priscilla Hayner, *Op cit.*, p. 127
- ⁵⁵ In a rather interesting comment at the National Conference on "A Truth, Justice and Reconciliation Commission for Kenya: Prospects and Obstacles" on 4-5 July 2003, human rights activist Oduor Ong'wen stated: "A witch-hunt is not necessarily bad, so long as the witch is justly and properly identified."
- ⁵⁶ Pheroze Nowrojee, "Suing for Truth and Reconciliation," in *Sunday Nation*, 6 April 2003
- ⁵⁷ *Ibid*
- ⁵⁸ Priscilla Hayner, *Op cit.*, p.184
- ⁵⁹ See Hayner, *Op cit.*, pp. 305-311
- ⁶⁰ Makau Mutua, *Op cit.*, p. 4
- ⁶¹ Mark Freeman and Priscilla Hayner, *Op cit.*, p. 129
- ⁶² Section 3(1) of the Commissions of Inquiry Act, Chapter 102 of the Laws of Kenya
- ⁶³ Section 3 (3) of Chapter 102 of the Laws of Kenya
- ⁶⁴ Section 10 (1) of the Commissions of Inquiry Act, Chapter 102 of the Laws of Kenya
- ⁶⁵ Section 3(3) (a) of the Commissions of Inquiry Act states that:
- (i) that evidence adversely affecting the reputation of any person, or tending to reflect in any way upon the character or conduct of any person, shall not be received unless the commissioner is satisfied it is relevant to the inquiry, and that all reasonable efforts have been made to give that person prior warning of the general nature of the evidence, and that, where no such warning has been given, the general nature of the evidence has been communicated to that person;
 - (ii) that that person shall be given such opportunity as is reasonable and practicable to be present, either in person or by his advocate, at the hearing of the evidence, to cross-examine any witness testifying thereto, and to adduce without unreasonable delay material evidence in his behalf in refutation of or otherwise in relation to the evidence;
 - (iii) that hearsay evidence which adversely affects the reputation of any person, or tends to reflect in any way upon the character or conduct of any person, shall not be received;
 - (iv) that no expression of opinion shall be received in evidence of the character, conduct or motives of any person, except in so far as the commissioner considers essential for ascertaining the truth of the matter into which he is commissioned to inquire, to depart from these instructions
- ⁶⁶ Makau Mutua, *Op cit.*, p. 4
- ⁶⁷ Alex Boraine, *Ibid.*, p. 47
- ⁶⁸ Makau Mutua, *Op cit.*, p.4
- ⁶⁹ Makau Mutua, *Op cit.*, p. 2
- ⁷⁰ Mark Freeman and Priscilla Hayner, *Op cit.*, p. 125
- ⁷¹ Hayner, *Op cit.*, p. 221
- ⁷² Hayner, *Ibid.*, pp. 221-222
- ⁷³ Mark Freeman and Priscilla Hayner, *Op cit.*, p. 129

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- ⁷⁴ Makau Mutua, *Op cit.*, p. 4
- ⁷⁵ Boraine, *Op cit.*, p. 52
- ⁷⁶ Hayner, *Op cit.*, p. 73
- ⁷⁷ Hayner, *Ibid.*, p. 73
- ⁷⁸ Hayner, *Ibid.*, p. 73
- ⁷⁹ Hayner, *Ibid.*, pp. 72-73
- ⁸⁰ Hayner, *Ibid.*, p. 73
- ⁸¹ Makau Mutua, *Op cit.*, pp. 4-5 for example argues that, "The Truth Commission must have the mandate to investigate the gross human rights violations and economic crimes committed by the KANU government and its officials from December 12, 1964, the day Kenya became an independent republic, to December 30, 2002, the day President Daniel arap Moi handed over power to his successor. The Commission must investigate all political assassinations, including those of Mr. Pio Gama Pinto, Mr. J. M. Kariuki, Mr. Tom Mboya, and Mr. Robert Ouko. The Truth Commission must closely investigate the causes and perpetrators of ethnic clashes, particularly those in 1991, 1992, 1997, 1998. It must look into the extra-judicial killings of thousands of ordinary citizens by the police and security forces, torture, and the arrest, harassment, and detention without trial of scores of others, many for their political opinion. Economic crimes, such as the looting of the public purse, land-grabbing, public corruption, and the transfer of stolen public funds into personal bank accounts off shore must be investigated without delay. The Commission must not issue blanket amnesties or become a whitewash past offenses. Its final report must include findings on the causes of violations and provide recommendations for corrective measures."
- ⁸² Freeman and Hayner, *Op cit.*, pp. 131-132
- ⁸³ Hayner, *Ibid.*, pp. 332-334
- ⁸⁴ Mark Freeman and Priscilla Hayner, *Op cit.*, p. 131
- ⁸⁵ Hayner, *Op cit.*, pp. 222-223
- ⁸⁶ Hayner, *Ibid.*, p. 223
- ⁸⁷ Hayner, *Ibid.*, pp. 217-218
- ⁸⁸ Hayner, *Ibid.*, p. 217
- ⁸⁹ Hayner, *Ibid.*, p. 218, 332-334
- ⁹⁰ Hayner, *Ibid.*, p. 218-219 states that, "The detailed and contextual information that past commission staff members have indicated would have been useful include: a basic history of repression in the county; a description of the forms of torture used, and exactly what different kinds of torture are called by locals in different parts of the country; who the elected leaders are in each area where staff are to travel, as well as key non-governmental local organizations and their leaders; the political affiliations and divisions between organizations (in order to avoid associating the commission with one political group); information on the actual threat of danger to commission investigators; distinctions between different regions in the country, including an assessment of continued violence, degree of politicization, and the likely concentration of victims in different areas; how to best deal with the psychological stress of taking testimony; and how to comfort deponents who show signs of psychological trauma."
- ⁹¹ Makau Mutua, *Op cit.*, p. 4
- ⁹² Mark Freeman and Priscilla Hayner, *Op cit.*, p. 131
- ⁹³ Mark Freeman and Priscilla Hayner, *Op cit.*, p. 134
- ⁹⁴ Mark Freeman and Priscilla Hayner, *Ibid.*, p. 134
- ⁹⁵ Chapter 102 of the laws of Kenya
- ⁹⁶ Section 3(4) thereof
- ⁹⁷ Section 3 (4) states: A commission may direct that the public shall not be admitted to all or to any specified part of the proceedings of the inquiry; and subject to any such direction, every inquiry shall be held in public, but the commissioner may exclude any person or class of persons from all or any part of the proceedings of the inquiry if he is satisfied that it is desirable so to do for the preservation of order, for the due conduct of the inquiry, or for the protection of the person, property or reputation of any witness in the inquiry or any person referred to in the course of the proceedings thereof, and may, if he is satisfied that it is desirable for any of the purposes aforesaid so to do, order that no person shall publish the name, address or photograph of any such witness or person or any evidence or information whereby he would be likely to be identified...
- ⁹⁸ Makau Mutua, *Op cit.*, p. 3
- ⁹⁹ Hayner, *Op cit.*, p. 229
- ¹⁰⁰ Hayer, *Ibid.*, p. 230
- ¹⁰¹ For more on this issue, see Priscilla Hayner, *Op cit.*, pp. 245-248
- ¹⁰² Boraine, *Op cit.*, p. 115
- ¹⁰³ Hayner, *Ibid.*, p. 77
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- ¹⁰⁸ Hayner, *Ibid.*, pp. 130-131
- ¹⁰⁹ Hayner, *Ibid.*, p. 130
- ¹¹⁰ Hayner, *Ibid.*, p. 130
- ¹¹¹ Hayner, *Ibid.*, p. 131
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- ¹²² Aryeh Neier in a contribution to a panel discussion on "Amnesty and Truth Commissions" at an Atrocities Conference.
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- ¹²⁵ Hayner, *Ibid.*, pp. 149-150
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- ¹²⁷ Boraine, *Ibid.*, p. 95
- ¹²⁸ Boraine, *Op cit.*, pp. 89-90
- ¹²⁹ Hayner, *Ibid.*, p. 145
- ¹³⁰ Boraine, *Op cit.*, p. 341
- ¹³¹ Hayner, *Op cit.*, pp. 154-165 tackles this issue extensively
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<http://www.bad.edu/hrp/sttrocities/panel6.htm>.
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- ¹³⁴ Alex Boraine and Janet Levy (eds.), *The Healing of a Nation?* Cape Town, Justice in Transition, 1995, p. xiv
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- ¹³⁷ Thurow, Roger. 2000. "Healing Pains: South Africa Shows Just How Tricky Is Reconciliation's Path – A Truth Commission Pried into Apartheid Horrors, but What of 'Justice'?" – A Blind Man Grows Restless," *Wall Street Journal*, July 17
- ¹³⁸ Track Two 6, 3-4, Centre for Conflict Resolution, University of Cape Town, December 1997, p. 27
- ¹³⁹ Hayner, *Ibid.*, p. 155
- ¹⁴⁰ Pheroze Nowrojee, "Preparing Intensively for an Effective TRC," Paper Presented in workshop on *A Truth, Justice and Reconciliation Commission for Kenya: Prospects and Obstacles*, " 4-5 July 2003, Nairobi
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- ¹⁴⁶ Hayner, *Ibid.*, p. 335
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**We the undersigned members endorse the Report of the Task Force on the
Establishment of a Truth, Justice and Reconciliation Commission.**

Member:

Signature:

Prof. Makau Mutua (Chairperson)



Rev. Dr. Tomothy Njoya (Vice-Chairperson)



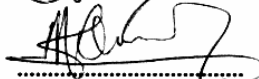
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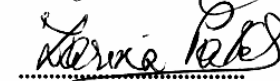
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Ms. Mumina Konzo



Ms. Zarina Patel



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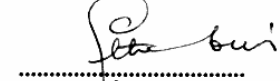
Sheikh Ali Shee



Rev. Mutava Musyimi



Bishop Prof. Zablon Nthamburi



Rev. Patrick Rukenya



Dr. Amukowa Anangwe

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Mr. Julius Sunkuli

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Mr. Kibe Mungai



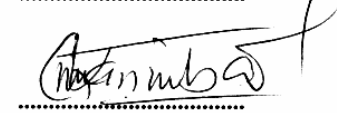
Mr. Tirop Kitur



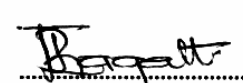
Mr. Davinder Lamba



**Permanent Secretary responsible for
Governance and Ethics or his representative**



Ms. Roselyne Lagat-Korir (Secretary)



ANNEX 8. TERMS OF REFERENCE

Gazette Notice No. 2701 The Kenya Gazette, Nairobi 17 April, 2003.

The Terms of Reference of the Task Force are:

- (a) to recommend to the Minister for Justice and Constitutional Affairs whether the establishment of a truth, justice and reconciliation commission is necessary for Kenya, and if so—
 - (i) how and when such a commission should be established:
 - (ii) the membership of such a commission:
 - (iii) the terms of reference of such a commission:
 - (iv) what powers or privileges should be conferred upon the commission in the execution of its mandate:
 - (v) the historical period to be covered by the commission's investigations; and
- (b) to make such further recommendations incidental to the foregoing as they may consider necessary.